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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No 697

CAESAR BOTTONE,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ARTHUR KARGER
Counsel for Petitioner
600 Madison Avenue
New York, N. Y. 10022

ALFRED DONATI, JR.
Co-Counsel

32 CASE PRESS INC., 421 Hudson St., N.Y.—ORegon 5-4540

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—v.—

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The above named petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above entitled cause on August 4, 1966, which affirmed a judgment of the United States District Court for the Southern District of New York convicting petitioner, and others, upon a jury verdict, on two substantive counts (counts 8 and 9), and one conspiracy count (count 10) of an indictment charging violation of 18 U.S.C. §§ 2314 and 2315.

Count 8 of the indictment charged the defendants there named, including this petitioner, with unlawfully, wilfully and knowingly transporting and causing to be transported in foreign commerce, goods, wares and merchandise of a value of $5,000.00 and more, to wit, quantities of tetracycline,

chlortetracycline and demethylchlortetracycline producing microorganisms, documents relating to the production of those drugs, quantities of a microorganism used in the production of triamcinolone and documents relating to the production thereof, knowing the same to have been stolen, converted and taken by fraud.

Count 9 charged the defendants named therein, including petitioner here, with unlawfully, wilfully and knowingly transporting and causing to be transported in foreign commerce, goods, wares and merchandise of a value of $5,000.00 or more, to wit, quantities of chlortetracycline producing microorganisms, knowing the same to have been stolen, converted and taken by fraud.

Count 10 charged a conspiracy on the part of petitioner and other defendants there named, together with named coconspirators not designated as defendants in that count, to violate 18 U.S.C. §§2314 and 2315, commencing about March 1, 1958 and continuing to the date of the filing of the indictment.

Petitioner was not named in any other count in the indictment. On January 20, 1966, petitioner was sentenced to a term of two years imprisonment on counts 8, 9 and 10, to run concurrently. Bail in the amount of $2,500.00 has been continued throughout these proceedings.

Opinions Below

The opinion of the Court of Appeals is not yet reported. It is printed in Appendix A, *infra*, pp. A1-A12. No opinion was rendered by the District Court.

Jurisdiction

The judgment of the Court of Appeals was entered on August 4, 1966 (App. C, *infra*, pp. A-15-A-16). A timely petition for rehearing and rehearing in banc filed by petitioner was denied by that Court on September 20, 1966 (Apps. D and E *infra*, pp. A-17-A-20). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Whether the crimes defined by 18 U.S.C. §§ 2314 and 2315, of transporting, receiving or disposing of stolen "goods, wares and merchandise" in interstate and foreign commerce, embrace the transportation, receipt or disposition of stolen intangible "trade secrets" or of documents not in themselves stolen which embody such stolen intangible "trade secrets".

2. Whether a defendant's Fifth and Sixth Amendment rights are violated where a third party, surreptitiously acting as a *de facto* agent for the Government, after the Government's investigation has focused upon the defendant, secures statements from the defendant for use by the Government, through interrogation exacted as the price for the defendant's obtaining relief from a substantial contempt judgment in favor of the third party, without advising him of the actual purpose of the interrogation or of his rights under the Fifth and Sixth Amendments, and the Government is then permitted to use such statements against the defendant at his trial on criminal charges.

3. Whether in the circumstances described in Question 2, *supra*, the defendant's Fifth and Sixth Amendment rights

are violated by the trial court's failure to order a full hearing as to the circumstances surrounding the securing of the statements in question and the voluntariness thereof, and by its failure to submit to the jury the issue of voluntariness.

'4. Whether in a criminal prosecution for transporting or receiving or disposing of stolen goods of the value of $5000 or more in interstate or foreign commerce, under 18 U.S.C. §§ 2314 and 2315, and for conspiracy to do so, the jury may be properly charged that in reaching its determination of the "market value" of the goods, as that term is used in 18 U.S.C. § 2311, it may take into consideration evidence of such matters as the cost of production, the cost of replacement, the value to the owner, the value under special circumstances and other matters not reasonably related to the market value of the materials involved.

5. Whether in a criminal prosecution for transporting or receiving or disposing of stolen goods in interstate or foreign commerce, under 18 U.S.C. §§ 2314 and 2315, or for conspiracy to do so, evidence of participation by a particular defendant in the transportation and disposition of the goods involved is sufficient to support his conviction where there is nothing in such evidence to show knowledge on his part that the goods have been stolen.

6. Whether in a criminal prosecution for transporting in foreign commerce a stolen pharmaceutical culture allegedly of the value of $5000 or more, under 18 U.S.C. § 2314, the conviction of the defendant may be sustained where there is no evidence that the particular culture transported by him was viable or of any potency or value at the time of the transportation and the only evidence bearing on the question shows that the culture transported was of no value.

7. The Question presented in the petition of co-petitioner Seymour Salb, and Question 3 presented in the petition of co-petitioner Nathan Sharff, concurrently filed in the companion cases arising out of the same judgment of conviction below, are incorporated herein by reference.

Statutes and Rule Involved

The statutes and rule here involved are 18 U.S.C. §§ 2311, 2314 and 2315; and Fed. Rules Cr. Proc., Rule 52(b). The pertinent portions thereof are set out in Appendix B, *infra*, pp. A-13-A-14.

Statement

As proof of the theft of the drugs and documents involved in the indictment, the Government relied upon the testimony of Sidney M. Fox, John Cancelarich, Leonard Fine and Joseph Gerace. Fox, a chemist with a Ph.D. in organic pharmaceutical chemistry, worked as a group leader in the chemical process improvement department of Lederle Laboratories, a subsidiary of American Cyanamid Co. at Pearl River, N.Y., from 1954 until September 1959. In that capacity he had occasion to work with the antibiotics tetracycline (TC), chlortetracycline (CTC) and demethylchlortetracycline (DMCTC), as well as other antibiotics and the steroid triamcinolone (284-8).* John Cancelarich, a chemical and industrial engineer, was employed at Lederle from 1952 through February 1961, except for the years 1954-56 when he was in the Army (824-25). While

* Numbers in parentheses, unless otherwise indicated, are references to the stenographic transcript of the trial below, three (3) copies of which have been filed with this Court, in lieu of appendices. Emphasis throughout this petition is supplied.

employed at Lederle he had assignments there with the pilot plant engineering group in chemical production and rose to the position of department engineer (826-27). Leonard Fine, an analytical chemist, holds degrees in chemistry, management and engineering and had worked in chemistry for various drug and scientific companies from 1943 to 1961, not including Lederle (1491-93). Joseph Gerace was employed at Lederle as a technician for 11 or 12 years until sometime in the year 1961 (1721-22).

Through Fox, the Government presented evidence designed to show that, while at Lederle, Fox stole crystals of triamcinolone, certain "intermediate" chemicals used in the production of that steroid and microorganisms for the production of TC, CTC and DMCTC. Fox also removed from Lederle certain documents relating to the procedures for producing these drugs, photocopied them at home, replaced the original documents and then used the photocopies as an aid in writing up processes for the production of these drugs. During the latter half of 1960 these writings were frequently made, using the same procedure, by Fox, Cancelarich and Fine together, with Cancelarich securing the documents from Lederle after Fox left that company. As is more fully developed below, it was these "write ups" which constituted the "documents relating to" the drugs here involved, which the indictment alleges were transported in violation of 18 U.S.C. § 2314.

Around August of 1960, Fox, Cancelarich and Fine organized a business known as Kim Laboratories. Kim was organized for various purposes, including legitimate ventures such as supplying hospitals and laboratories with chemicals and photocopy machines and supplies (831, 1565-

66.) From around August, 1960 until the latter part of that year, however, these three men also collaborated in writing up the aforementioned processes. Through Cancelarich it was shown that from around the time of the organization of Kim until his resignation from Lederle, Cancelarich too stole cultures for the production of these antibiotics, as well as additional documents, in connection with which the three followed the same practice of photostating them, returning the originals and then writing up, in their own language, the processes for production of these antibiotics.

In October 1960 Fox introduced Cancelarich and Fine to Elio Salvetti (832-833). Salvetti was named in the indictment as a defendant but did not appear at the trial. In late 1960, prior to a trip to Europe, Fox turned over to Cancelarich and Fine certain boxes containing, among other things, the cultures he had stolen and the write-ups of the procedures. In early 1961 Salvetti, Cancelarich and Fine broke with Fox and the three began to operate independently; Cancelarich and Fine kept the materials Fox had given them prior to his trip to Italy (410, 560, 843, 847, 1498, 1500-01, 1597).

Through the testimony of Fox, the Government offered evidence relating to Fox's dealings prior to and until early 1960 with the defendants Sharff and Salb, the latter being a chemist in partnership with Sharff in a business at that time known as Biorganic Laboratories. The Government's case as against those two defendants is treated in their petitions to this Court and will not be discussed here.

Bottone, after receiving his degree as a Doctor of Medicine from the University of Bologna, Italy in 1955, and after

a two-year period of internship and practice, entered upon a full time career in the pharmaceutical field (2198-2200). Although Dr. Bottone was born in the United States (in 1927), is married to an American citizen and has a four year old child born here, he had continuously resided and attended school in Italy between 1937 and 1955, except for his return to this country in 1953 to be married and his 1½ years service with the British 8th Army during World War II, upon the termination of which he received an honorable discharge (2195-99, 2201). With this background, Bottone's pharmaceutical career was concentrated in the international field and required numerous business trips yearly to Europe and even the Far East (2219-20).

From about the middle of 1958 to the end of 1959 Bottone was in partnership with Salvetti in the pharmaceutical field under the trade name of Kasal Trading Company (2214, 2230), and they had occasion during that period to do business with the Biorganic Company which was run by defendants Sharff and Salb (2207, 2231). Bottone's partnership with Salvetti was terminated at the end of 1959, when Bottone formed a new company known as Pan-Med Pharmaceutical Company, in which Salvetti had no interest, for the purpose of buying and selling medicinal chemicals (2200-01, 2214). Bottone thereafter continued doing a regular pharmaceutical business with Biorganic, through Sharff and Salb, until Biorganic went out of business in 1962 (2229).

The Government also offered evidence, through the witness Helmuth Wawretschek, that on April 10, 1961 he entered into an agreement with Sharff, Salb, Salvetti and Bottone providing for the purchase by the latter group of

a total of a 50% interest in Wawretschek's pharmaceutical company, Ankermann Italian, located in Milan, Italy. Bottone's investment in that company was not finalized, however, until sometime in May 1961 (2220). The investment originally had been suggested by Wawretschek to petitioner in March 1961 (675-678).

By way of background to that proposal, it should be noted that in the course of petitioner's pharmaceutical business, and in the period from 1957 until approximately February 1963, petitioner had purchased medicinal chemicals from Ankermann (661, 2202, 2203). Bottone and Mr. Wawretschek became good friends as well as business associates and on various occasions in the course of their business dealt with each other on a credit basis (2203, 2206).

Around May of 1960, Wawretschek had taken Bottone, Sharff and Salb on a tour of the Ankermann plant in Milan and at that time showed them the laboratory and equipment of the company and told them he had an unusual technique for selecting cultures, by which he could separate the better ones from the weaker strains. Wawretschek also told them he had the better microorganisms for TC, CTC and DMCTC and could select those that were best among them without having to run test fermentations in the plant (2435-38).

Wawretschek testified that in March 1961 he met Bottone in Berlin, where he suggested to petitioner that an American group be formed to be composed of Bottone, Sharff, Salb and Salvetti, and that they join "as a third party" in Ankermann by buying some stock of Ankermann. Petitioner thought this was a good idea and said that he would seek to bring it about in America (676-78, 746).

Thereafter, and on April 10, 1961, Wawretschek signed a "memorandum" of contract (Exhibit 39) with Sharff, Salb, Salvetti and Bottone, Salvetti signing for Bottone since the latter was not present at this meeting (678-79). The memorandum provided for the purchase of a 50% interest in Ankermann, for a total price of approximately $160,000. Bottone's portion of that investment amounted to $42,000, for which he received about 11% of the stock of the company. However, he never received any money from the company as a result of that investment and was never an officer, director or employee of the company (2204-05, 2339).

It was Cancelarich's understanding that Bottone was a party to the above-noted April 10 agreement and that the agreement "was a perfectly legitimate deal" (1293-94). Mr. Wawretschek was not named in the indictment either as a defendant or co-conspirator.

On the same date as the investment agreement, April 10, Wawretschek hired Cancelarich to work at Ankermann (1291-92). It was the Government's theory that Ankermann was to be supplied, through Cancelarich, with the stolen Lederle materials which Cancelarich and Fine had retained after their break with Fox, and that the investment in Ankermann was thus a part of a continuous conspiracy, alleged in Count 10, to obtain and transport to Italy stolen Lederle cultures and documents, which conspiracy had originated between Fox, Sharff and Salb; and the jury was so charged (e.g., 2726-27, 2741, 2821-23).

The Government contended that Bottone became a party to that conspiracy at or about the time of his investment in Ankermann, in that, the Government alleged, Bottone

then knew that Cancelarich would be providing Ankermann with stolen Lederle cultures (2761).

On April 16, 1961, Bottone drove Cancelarich to Idlewild Airport and paid for his airplane ticket to Italy. Cancelarich testified that on that date he had with him, in an attache case, two rolls of microfilm and some SOP's ["Standard Operational Procedures"] "that Dr. Fine (sic) and I had written up", along with some TC, DMCTC and F3 cultures originally obtained from Lederle, the DMCTC being in "lyophilized" form (863-64). It was the Government's contention that when Cancelarich made that trip Bottone knew that Cancelarich was carrying such, previously stolen, materials. This trip was thus the basis for Count 8 in the indictment, the first substantive count on which Bottone was convicted.

As to Count 9, the evidence showed that in September 1961 Bottone delivered a package to Wawretschek, in Italy, which Bottone had obtained from Sharff at Biorganic, and that the package contained certain test tubes. The Government contended at the trial that those test tubes contained live CTC microorganisms, originally stolen from Lederle, and that Bottone knew this when he transported and delivered the package to Wawretschek.

At the time of the crimes alleged in the indictment (essentially between 1958 and 1961) the drugs here involved were being produced and marketed under the trade names "achromycin" (TC), "aureomycin" (CTC), "declomycin" (DMCTC) and "aristocort" (triamcinolone). It was shown at the trial that, during and prior to those years, a great deal of knowledge was in the public domain as to methods of production, and other matters, relating to the

drugs here involved. The Government's "expert" witness, Dr. Theodore F. Scholz, Administrator of Chemical Process Improvement at the Lederle Laboratories division of American Cyanamid Co. since 1957, testified extensively as to that information which was in the public domain, and that which was secret, until the end of 1961, as respects the production and availability of the antibiotics tetracycline (TC), chlortetracycline (CTC), demethylchlortetracycline (DMCTC) and the steroid triamcinolone, involved in the allegations of the indictment. Those drugs were patented, and the process for their manufacture thus revealed, over a period of several years prior to the acts in issue at the trial (1899, 1950, 1974-75, 2025-28, 2050). At the time such patents became effective, the microorganisms involved in their production also became publicly available and anyone who was interested could get a sample of those cultures to develop them (732-33, 1900-03).

The testimony of one of the Government's own expert witnesses, Dr. Growich, a microbiologist at Lederle Laboratories, established that anyone could obtain, from the public depositories, a sample of the lower-yielding microorganism deposited there by Lederle, work with it to improve its yield and, even by simply using a different "medium" in experiments with these cultures, obtain a higher yield than that produced by the company depositing that culture (281, 283).

Chemicals necessary for producing these drugs, as well as the end products themselves, were being produced during those years from various sources and were frequently susceptible of independent chemical manufacture. Moreover, many important specifics as to the techniques and

ingredients necessary for obtaining higher yields in the production of these antibiotics were matters of public knowledge, or reasonably discoverable by one trained in this field, such as a microbiologist (1887-89, 1950, 1959-61, 1965-75, 1979-86, 2049-50, 2073-74, 2091-92, 2267, 2446-54).

The Government witness Wawretschek testified that he himself had obtained cultures from Lederle under a license agreement in 1952 for CTC, which were then used for the production of that drug in Europe (723-26, 728, 729-31).

In view of the familiarity of the names of these drugs to those in the field, the vast amount of detailed knowledge in the public domain as to the methods for their production, and the various sources of commercial production in fact of the drugs themselves and the chemicals required for their production, a showing by the Government that a particular defendant had knowledge of the specific *types* of drugs or processes with which he was dealing would have been insufficient to show knowledge on his part that those drugs or processes had in fact been stolen. As to this issue it was thus incumbent upon the Government to prove, as was its theory at the trial, that petitioner had knowledge of the fact that the materials had been stolen from Lederle and were not the products of independent research and discovery or of an authorized acquisition from Lederle (105, 900-01, 2692-93, 2761, 2767, 2801).

At the trial, Bottone took the stand and denied that he was involved in any of the matters contained in the indictment (2227-28), and denied that, during any of the meetings or conversations he had with any of the people involved in the instant case, there was any talk about procedures or cultures being stolen from Lederle (2401-02).

Bottone testified that during the period in which he did a regular business with Biorganic (1958 to 1962), he had occasion to be there about once each week or ten days (2228-29); he was under the impression that defendant Salb was an expert in the field of steroids and that Biorganic manufactured the product triamcinolone (2209, 2264).

Bottone testified that the first time he discussed cultures and processes with Sharff was when Sharff came to him and said he had cultures and processes and asked Bottone to try to find sources where he could sell them in Italy. Sharff told Bottone that he had microorganisms and a procedure for a new antibiotic which *he* had developed, without identifying it at the time, and that if Bottone could find a purchaser for it he would get a commission (2480-81). Sharff also told Bottone that he, Sharff, Salb and others had done extensive work and had discovered this antibiotic, but because it was very similar to an antibiotic that was about to be patented in the United States they did not have any hope of being able to use it here, so they wanted to use it in a country where United States patents did not apply, namely, in Italy. Bottone testified that was why they went to him and that they did not at any time ever mention the name Lederle to him (2483-84).

The evidence adduced by the Government in its effort to connect this petitioner with the conspiracy charged in Count 10, and the unlawful transportations charged in Counts 8 and 9, fell into two categories: (1) evidence relating to a certain meeting held at Biorganic on April 14, 1961, and (2) evidence relating to Bottone's activities generally prior to and after the April 14 date.

The Government relied heavily upon the testimony of its witnesses as to certain statements made by Concelarich and Fine at the April 14 meeting, in an effort to show that Bottone acquired knowledge at that meeting that Cancelarich and Fine were in possession of stolen Lederle materials, which they intended to transfer to and use at Ankermann. The Court of Appeals below expressly ruled that "it was not proved" at the trial that Bottone heard any of the conversations relied upon by the Government to show such knowledge on Bottone's part (App. A, *infra*, n. 3 at p. A-6).

The Court of Appeals held, however, that "the evidence of his (Bottone's) participation in discussions as to disposition of the goods and of his substantial role in facilitating transportation abroad of both cultures and participants, which we summarize in the margin," that is, what the Court of Appeals called "all this evidence of his comings and goings", "amply met the Government's burden" of showing the requisite guilty knowledge on Bottone's part. (App. A, *infra*, pp. A-5—A-6). That summary of the evidence as to Bottone, for the period prior to April 16, 1961 (the date alleged in Count 8), is set out, in full, as follows (App. A, *infra*, n. 3, pp. A-5—A-6):

> "Bottone's first significant appearance was in June, 1960 when Sharff and Salb were endeavoring to persuade Fox it would be dangerous for him to sell the stolen materials by himself. They placed a fake advertisement seeking information in a trade paper under the name of a Dr. Angelo Mancuso, with the address of Sharff's brother-in-law. Fox answered the ad and met in London with a business associate of Bottone, Salvetti, who masqueraded as Dr. Mancuso. Salvetti telephoned Bottone who was then in

Italy and, saying he had just met with a group that had closed a big deal which he had to stop, asked Bottone to cable him in London that Interpol was investigating the theft of Lederle trade secrets. Bottone sent the cable, left for London in the middle of the night, and secretly observed Salvetti show the cable to Fox. Afterwards Salvetti told Bottone he wanted to stop Fox' deal so that he might offer the same information and micro-organisms at a lower price. In March, 1961 Bottone had a visit in Berlin with Wawretschek, head of a Milan pharmaceutical firm, Ankermann, which had been a purchaser of the stolen cultures and processes; Wawretschek complained about the quality of the micro-organisms and suggested a new deal whereby Salb, Sharff, Salvetti and Bottone would buy into his company. Bottone telephoned this proposal to Salvetti in Rome; on April 10 the American group executed a purchase contract in New Jersey, with Salvetti signing in Bottone's behalf. On April 14 Fine and Salvetti drove Cancelarich from Salvetti's apartment in Bronxville, New York to Biorganic to discuss Cancelarich's employment at Ankermann with Salb, Sharff and Bottone. Cancelarich made a full revelation of his own thieveries and his possession of Fox' collection of Lederle cultures and processes, but *it was not proved that this was heard by Bottone,* who arrived late. Two days later Bottone drove Cancelarich from Fort Lee, N.J. to Kennedy Airport and bought him a ticket to Italy; Cancelarich carried stolen cultures and papers describing Lederle's processes."

The remainder of the Court's summary of the evidence of petitioner's "comings and goings," for the period from April 16 through September, 1961, is treated *infra* (pp. 17-19, 20-1).

As to that April 16 trip (the subject of count 8), the evidence as to Bottone showed merely that on that date Cancelarich traveled to Fort Lee, New Jersey where he met with Bottone. Petitioner drove him to the airport and there bought an airplane ticket for Cancelarich and the latter flew to Italy (862-63, 865). The expense of the airline ticket was borne by petitioner's company, Pan-Med, which had an account with a travel agent for tickets to Europe. Mr. Wawretschek, while in New York in April 1961, had requested Bottone to provide Cancelarich with the tickets because of the latter's pending employment by Wawretschek (2217-19, 2224). Nothing was shown to have occurred between April 14 and 16, or on the ride to the airport, as respects this petitioner, which would have apprised him as to what Cancelarich was carrying with him to the airport (*supra*, p. 11) or that Cancelarich was carrying *anything* of an unlawful nature.

The Government also adduced testimony by Cancelarich and Fine as to certain dealings they and Bottone had with a Dr. Marpurgo from and after May 1961, when Marpurgo was representing the Italian drug firm MIBA.

Bottone testified that he had known Marpurgo since 1958 or 1959 and that in May 1961, while Bottone was in Milan to finalize his investment in Ankermann, Marpurgo visited him and asked him to recommend a chemical engineer for some consulting work to be done at MIBA. Petitioner then telephoned Cancelarich, who he had been told was a chemical engineer (2220-2221, 2358). The facts, as to what occurred thereafter, were found by the Court of Appeals below to be as follows (App. A, *infra*, n. 3 at p. A-6):

> "Bottone introduced Cancelarich to a Dr. Marpurgo, representing a Milan firm called MIBA, who

was interested in buying a DMCTC process. Cancelarich promised to furnish this for $60,000, which he agreed to split with Bottone who said he would split his share with Salvetti. The culture and processes furnished MIBA were stolen from Lederle. Somewhat later Bottone drove Fine, equipped with stolen Lederle cultures and documents destined for Ankermann, from New Jersey to Kennedy Airport and bought him a ticket to Italy. Fine and Marpurgo subsequently reported to Bottone's (sic) MIBA's success with the processes supplied by Cancelarich. In July Bottone financed a trip to Italy for Fine whom he asked to collect $2,000 of his share from Marpurgo."

As respects the incidents above-noted, the evidence also showed that Fine's trip came about when, late in May, 1961, he telephoned Bottone, told him he was going to Italy to inspect the analytical facilities of Ankermann, told him he needed transportation, and said Cancelarich had advised that Bottone would arrange such transportation. Bottone told Fine to come to his Pan-Med offices, which Fine did (1512, 1584). Petitioner then drove Fine to Idlewild Airport and bought Fine's plane ticket (1515). During the drive to the airport Fine "told Bottone that I had the six analytical standards, the four antibiotic cultures and the engineering forms that John Cancelarich requested and that I was going to inspect and evaluate the analytical facilities" at Ankermann (1512, 1515).

But there was nothing in that conversation to apprise Bottone of any unlawful aspect in Fine's possession or acquisition of those materials. Fine had obtained the analytical standards from Joseph Gerace, at Cancelarich's request, and the cultures from a William Schafer. Fine

had earlier given to Schafer the culture collection Fine had received from Cancelarich, who had said it was Fox's (843, 1588). There was nothing, however, to show that any of these facts were known or disclosed to Bottone.

Cancelarich himself testified that he never told Marpurgo that he was dealing in stolen cultures (1319), and there was no showing as to the source of any microorganisms or procedures intended to be supplied by Cancelarich to Marpurgo, or whether they were ones which had been stolen. Marpurgo was not named as a defendant or co-conspirator in the indictment. Moreover, Fine testified that in December 1961, when he saw Bottone at Pan-Med, Bottone told him that "Dr. Marpurgo has absconded with the $10,000 from MIBA" and that if Fine wanted his share, he "should sue Marpurgo" (1538).

As to count 9, it appeared that, in September 1961, a few days before leaving on a trip to Europe, Bottone mentioned to Sharff that he was going to Europe on business. Sharff asked him if he would take along a package to Wawretschek, and Bottone said he would.

At that time Bottone knew as a result of the tour of the Ankermann plant conducted by Wawretschek a year earlier (*supra*, p. 9), that Wawretschek had a problem with Ankermann's lyophilization facilities and Salb had agreed to have some of Ankermann's cultures lyophilized by the public depository of the ATCC (2435-39). Also, others in Italy had on occasion asked Sharff or Salb to get them some cultures from public depositories in the United States (2427-28). The evidence showed that Bottone was aware that Biorganic had ordered and received a number of lyophiliz-

ations of TC, CTC and DMCTC cultures, from a public depository (ATCC) for a nominal charge, the bills for which Bottone delivered to Wawretschek at Ankermann in March and September 1961 (2440-44, 2473; Def. Exs. AD & AE). Bottone also testified that Sharff told him at the time that he, Sharff was sending to Wawretschek the cultures made from the organisms which Wawretschek had sent and which were lyophilized by the ATCC (2449-50, 2475).

Wawretschek testified that in September 1961 petitioner delivered "a small package" to him in Milan, Italy (695). Although the witness testified at first (through an interpreter), that when Bottone made the delivery he told the witness that the package was from Sharff and contained strains that came from Fine (695), Wawretschek thereafter stated that Bottone did *not* mention Fine's name or the source of the package, or say anything other than that he was delivering it for Mr. Sharff. The witness thus answered "yes" to the question, "Did he [Bottone] not at that time merely tell you that he had brought this package over at the request of Mr. Sharff and was merely delivering it to you?" (747), and he testified that Bottone said only that he was delivering the package from Sharff, and it was the cultures the witness wanted, or was expecting (748-49). The witness then said "What he [Bottone] said is 'Here is a package. I brought it. Mr. Sharff gave it to me to give to you' " (749). The witness could not remember what was in the package delivered except that "there were a few tubes with some slants in them" (696).

The Court of Appeals below, overlooking this evidence, stated that "in September 1961 Bottone, at Sharff's request, took a CTC culture from New York to Milan for de-

livery to Wawretschek, telling him that the package contained strains coming from Fine" (App. A. *infra*, n. 3, at p. A-6).

Upon delivery of the package Bottone asked Wawretschek for a receipt for it but the witness refused to give it to him (751). On September 15, 1961 Sharff wrote a letter to Mrs. Wawretschek concerning the above delivery, stating that since Bottone was planning a trip to Milan earlier that month Sharff had asked him to make this delivery to Mr. Wawretschek (2751). Sharff then went on to state in that letter (Ex. J) as follows (2486-87):

> "Dr. Bottone has not returned yet, so I do not know what actually happened. However, he wrote a short letter to me in which he said he delivered the strains to your husband in accordance with instructions and gave him the receipt for his signature. Instead of signing the receipt, your husband tore it up and started yelling that it should have been delivered two months sooner. *Dr. Bottone knew absolutely nothing about this, since he was merely acting in the capacity of a delivery boy.*"

On or about December 13, 1961 small scale tests were made in the Ankermann laboratory on "the CTC culture" apparently contained in the package delivered by Bottone; large scale production was to be begun if those tests were successful (1426, 1431). The tests of that culture apparently proved the culture ineffective for production; CTC never went into production from this culture at Ankermann (1431). At the trial below Cancelarich acknowledged that in a confession-affidavit given by him on April 6, 1962 he had stated that the CTC sample delivered by Bottone to Wawretschek "was never used" (768, 1433).

The Ankermann venture was wound up, at a loss to Bottone, Sharff and Salb, by the beginning of 1962 (1231-32, 2204-05).

At the trial the Government also relied upon certain depositions Bottone had given between May and October 1962, in a civil proceeding in New Jersey, unrelated to the instant case, in an effort to prove that prior to Bottone's investment in Ankermann he had learned through Salvetti that Cancelarich was in possession of microorganisms stolen from Lederle, and that Cancelarich was to provide them to Ankermann in connection with that investment (e.g., 2759, 2761). Over objections by counsel, the Government introduced statements from those depositions in evidence on its direct case, and later cross-examined Bottone with the depositions and with certain "off-the-record statements" made during the same period of time by Bottone under questioning by Mr. Bate, the attorney who had conducted the deposition interrogations. It is this petitioner's position that those depositions and off-the-record statements were inadmissible against him (see *infra*, pp. 31-42).

Moreover, Bottone made it clear that whatever knowledge on his part might be indicated by the depositions, particularly as to what he may have learned from Salvetti, was not indicative of what he knew *prior* to the taking of those depositions in mid-1962, because "by that time I had learned of a lot of facts that I certainly didn't know earlier in 1961 or 1960" (2332). Further, Bottone testified, and the depositions themselves indicated, that when Bottone gave them he was confused as to certain matters, he made certain statements based on "rumors",

and he made errors, and thus made statements which were untrue (2265-2269).

In sum, and apart from the unreliability of the "facts" and dates in the depositions, although they dealt with the possession and sale of microorganisms and procedures for production of the drugs, there was no showing of knowledge on Bottone's part that any of the cultures or procedures being discussed, or to be supplied *by Salvetti,* had been *stolen,* or that any of the people Bottone was dealing with were in *possession* of any such *stolen* cultures, or that Cancelarich or Fine were to supply anything other than technical expertise.

There was no showing by the Government that Bottone was aware, during the time of the crimes alleged in the indictment, that *Salvetti* had at one time been associated with *Fox* in the sale of any Lederle materials or in any *unlawful* venture, and Bottone himself denied any such knowledge (2326, 2328).

Despite Bottone's denial on the stand that he knew of Salvetti's intent to supply cultures to Ankermann through Cancelarich, the trial judge charged the jury that "Bottone has *admitted* . . . that (he) knew what Salvetti was going to do with Cancelarich at Ankermann before he, Bottone, bought the stock" (2802), and that "It has also been *shown* that Bottone's investment in the Ankermann plant was made at a time when he was aware . . . of how Salvetti was going to use Cancelarich" (2825-26).

Certain additional facts are set forth below.

Reasons for Granting the Writ

1. As to the applicability of 18 U.S.C. §§2314 and 2315 to the transportation of intangible "trade secrets."

An important question of general applicability is here presented, concerning the scope and reach of 18 U.S.C. §§2314 and 2315.

As noted above (*supra*, p. 6), none of the multudinous documents transported in this case were documents which had been removed from Lederle. Except for one or two instances, they were not even actual copies of Lederle documents but consisted instead of "write-ups" of applicable procedures in Fox's, Fine's or Cancelarich's *own language*, based in part on the Lederle documents and in part on their *own experience*. Indeed, in a number of instances the documents consisted of nothing more than the embodiment of the "know-how" of Fox and Cancelarich. (323-4, 363-5, 406-10, 880, 1055-6). As the Court of Appeals below itself pointed out (App. A, *infra*, pp. A-7—A-8):

> "The standard procedure was for Fox and Cancelarich to remove documents from Lederle's files at Pearl River, N.Y., take these to Fox' home within New York state, make photocopies, microfilms or notes, and then restore the purloined papers to the files; only the copies and notes moved or were intended to move in interstate or foreign commerce."

The Court of Appeals characterized the issue here presented as follows (App. A, *infra*, p. A-7):

> "The *serious question* is whether, on the facts of this case, the papers showing Lederle processes that were transported in interstate or foreign commerce

> were 'goods' which had been 'stolen, converted or taken by fraud' *in view of the lack of proof that any of the physical materials so transported came from Lederle's possession.*"

The issue was squarely raised by defense counsel by objections to the admission of the foregoing documents in evidence and by motions to strike, and the District Court ruled that the documents constituted stolen "goods, wares and merchandise" within the ambit of 18 U.S.C. §§2314 and 2315 (902-10, 2151, 2154-7). The District Court's charge also permitted the jury to find defendants guilty solely on the basis of the transportation of such documents.*

It is petitioner's position that the phrase "goods, wares and merchandise" in the penal statutes here involved cannot be read to include "intangibles" or "know-how", especially in the light of the settled rule that penal statutes must be strictly construed (*Yates* v. *United States*, 354 U.S. 298, 304-6).

A criminal statute may thus not be broadened by judicial construction to bring within its purview "instances which are not embraced in the language employed in the statute,

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* Thus, the Court charged with respect to the substantive counts that it would be sufficient for the Government to establish a particular defendant's knowledge "that the culture *or* documents had been stolen" (2795). With respect to the conspiracy count, the Court charged that it was sufficient for the Government to establish that it was a part of the conspiracy "to do *any one*" of certain specified acts involving the unalwful transportation or receipt of the materials involved, and the jury could thereby well have understood that it was sufficient for them to make such a finding with respect solely to the "documents" referred to by the Court (2810-11). Indeed, the Court specifically stated that it was sufficient for the jury to find that one of the objects of the conspiracy was the unlawful receipt "of all *or a part* of the goods" refetred to by the Court (2811).

or implied from a fair interpretation of its context, even though they may involve the same mischief which the statute was designed to suppress." *United States* v. *Chase,* 135 U.S. 255, 261; *Fasulo* v. *United States,* 272 U.S. 620, 629; *Yates* v. *United States, supra,* 354 U.S. at 305.

It has been recognized even in civil cases that the natural and ordinary import of the phrase "goods, wares and merchandise" is such as to exclude "intangibles" from its scope. Thus, in *Lenroot* v. *Western Union Telegraph Co.,* 141 F. 2d 400 (2d Cir.), rev'd 323 U.S. 490, the Second Circuit had before it the question whether the word "goods" as used in the Fair Labor Standards Act, was sufficiently broad to include "intangibles" in the form of electric impulses through which telegraphic communications are transmitted. The statute before the Court specifically defined the term "goods" as meaning "goods * * * wares, products, commodities, merchandise, or articles or *subjects of commerce* of any character", the phrase "subjects of commerce" having been added by an amendment to the original statute. The Court of Appeals, in an opinion by Judge Learned Hand, held that the statute embraced "intangibles", but did so solely on the basis of the amendment which specifically expanded the scope of the term "goods" to include "subjects of commerce". Judge Hand stated as follows (141 F. 2d at 402):

> "Until . . . [the amendment] was made the subdivision had read: 'wares, products, commodities, merchandise or articles of commerce of any character.' So far as we can see, no more complete enumeration could have been made of every kind of '*tangibles*'; so that, when the Senate expanded the phrase to include, not only 'articles' of commerce, but 'subjects' of

> commerce, the opposition would have meant nothing, if it had not included 'intangibles'." (Emphasis in original.)

In approving the Second Circuit's interpretation of the term "goods" in the same case, this Court also specifically did so on the ground that "telegraphic subjects are clearly 'subjects of commerce' and hence . . . they are 'goods' under this Act . . ." See *Western Union Telegraph Co.* v. *Lenroot*, 323 U.S. 490, 502-3. This Court, however, reversed on the ground that the telegraphic transmission of "intangible messages" could not be regarded as the "shipment" of "subjects of commerce" within the meaning of the statute, since the term "ship", "not being artificially defined by statute, is from the ordinary speech of people" and "we do not ordinarily speak of ['intangible messages'] as being 'shipped'." (323 U.S. at 505-6).

Other applicable authorities have all been consistently to the same effect. *Sealy* v. *Mitchell*, 249 F. 2d 327, 331 (5th Cir.); *Scholl* v. *McWilliams Dredging Co.*, 169 F. 2d 729 (2nd Cir.); *Mitchell* v. *Lublin, McGaughy & Associates*, 250 F. 2d 253, 257 (4th Cir.), rev'd on other grounds, 358 U.S. 207; *Bozant* v. *Bank of New York*, 156 F. 2d 787, 790 (2nd Cir.). See also Bartenstein, *Research Espionage: A Threat To Our National Security*, Food Drug Cosm. L.J., December 1962, p. 813 at 821; Liebhafsky, *Industrial Secrets and the Skilled Employee*, 38 N.Y.U.L. Rev. 324, 334 (1963).

The Court of Appeals in the instant case apparently similarly recognized that the statutory reference to stolen "goods, wares and merchandise" could not properly be applied to the transportation of stolen intangible ideas or "trade secrets" as such. It thus stated that "the statute

would presumably not extend to the case where a carefully guarded secret formula was memorized, carried away in the recesses of a thievish mind and placed in writing only *after* a boundary had been crossed" (App. A, *infra*, p. A-8).

The Court held, however, that the instant situation was different because here the thieves reduced the trade secrets to writing *before* crossing the boundary (App. A, *infra*, pp. A-8–A-9). But what the Court overlooked is the crucial circumstance that while the physical documents embodying such secrets could perhaps be regarded as tangible "goods", they can in no way fit the statutory description of *stolen* tangible goods, since, as the Court itself recognized, there was a "lack of proof that any of the physical materials so transported came from Lederle's possession (App. A, *infra*, p. A-7).

It is no answer to say, as the Court of Appeals has here done, that "the physical form of the stolen goods is secondary in every respect to the matter recorded in them" (App. A, *infra*, p. A-8). For the emphasis thus placed on the stolen nature of the *intangible ideas* embodied in the transported documents, is flatly inconsistent with the basic premise that the statutory term "goods" does not embrace intangibles. The added fact, emphasized by the Court (App. A, *infra*, pp. A-7—A-8), that such documents were prepared with the aid of actual Lederle documents feloniously removed from Lederle and returned thereto, is likewise of no materiality, since there is no claim that there was ever any transportation in commerce of any actual Lederle documents.

In short, the Court below concluded that a situation like that here presented *should* be embraced by the statute. But

the question is, not what the scope of the statute *should* be, but what it *actually is*, construed in the light of the language deliberately chosen by Congress and the settled canon of strict construction of penal statutes (*Yates* v. *United States*, *supra*, 354 U.S. at 304-6). If any extension of the reach of the statute be deemed in order, it is axiomatic that the remedy therefor lies with Congress, not with the courts.

Nor may the question here presented be avoided on the basis of the alternative conclusion of the Court of Appeals that "the judgment may stand even if the statute does not reach far enough to include the copies and notes" (App. A, *infra*, p. A-9). It reached that conclusion primarily on the ground that the question presented affected only counts 8 and 10, as respects this petitioner, and that since petitioner had also been convicted on count 9 and concurrent sentences had been imposed, the judgment could be affirmed on the basis solely of the latter conviction (*id.*, pp. A-9—A-10).

The Court acknowledged that error on one count may not properly be overlooked on the basis of a concurrent sentence on a valid count, where the error is such that it might have prejudiced the defendant in respect of "the results of the proceedings" or the length of the sentence imposed on the latter count (*id.*, p. A-10). See also *United States* v. *Trenton Potteries Co.*, 273 U.S. 392, 402. The Court held, however, that the error here claimed was not of that character since it affected only the jury's appraisal of the value of the "goods" transported, and since (a) the requirement of the governing statutes that the "goods" be "of the value of $5,000.00 or more" did not affect any "legitimate interest" of the defendant but was rather designed only "to avoid overtaxing the Department of Justice", and (b)

the jury might and probably would have convicted in any event (App. A, *infra*, p. A-10). The Court thereby, however, in effect read out of the Congressional legislation a distinct jurisdictional limitation specifically mandated by Congress—a limitation deemed so important that Congress went to pains to define even the standard of value to be applied in such cases (18 U.S.C. §2311). The Court further ignored the settled rule "which requires a verdict to be set aside in cases where the verdict is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected." See *Yates* v. *United States*, *supra*, 354 U.S. at 312.

Moreover, in a case of such length and complexity as that at bar, involving hundreds of pages of highly technical testimony and scores of exhibits, the voluminous documents put in evidence by the Government inevitably permeated the entire case and amounted to such a massive assault on the senses of the jury that it cannot be maintained that there is no "reasonable possibility" that the error here complained of in respect to such documents "might have contributed to the conviction" on count 9, as well as on the other counts. *Cf. Fahy* v. *Connecticut*, 375 U.S. 85, 86-7. Further, the Court of Appeals itself noted that the District Judge's "remarks on imposing sentence show that he viewed defendants' activities as a whole" (App. A, *infra*, p. A-11), and he might well have imposed a substantially shorter sentence on petitioner if the latter had been acquitted on counts 8 and 10 and convicted only on the basis of the single episode involved in count 9. See also the discussion as to the claimed insufficiency of the evidence on count 9 (*infra*, pp. 50-54).

2. As to the statements secured from petitioner after the Government investigation had focused upon him.

The highly important constitutional question here raised presents a further phase in the development of the *Massiah-Escobedo-Miranda* doctrine.

As has been noted (*supra,* p. 22), the Government used against petitioner at the trial certain statements obtained from him in the course of depositions conducted by the Merck Company in a separate civil action and through off-the-record interrogation of petitioner by Merck's attorney. Some of the statements were introduced in evidence as part of the Government's direct case; other portions were used by the Government in cross-examination of petitioner.

Petitioner's counsel objected to the admission in evidence of the statements adduced in the depositions on the basis of the Fifth Amendment privilege against self-incrimination, noting that the depositions had been obtained under subpoena (2003-4). Counsel also objected to the use in cross-examination of the memoranda of the off-the-record questioning of petitioner by Merck's attorney on the ground that petitioner was not represented by counsel during such questioning (2366-8, 2374-5). It also appeared that petitioner was not represented by counsel during a substantial portion of the taking of the depositions (2415).

The crucial nature of the evidence derived from the statements here in question is illustrated by the following excerpt from the trial court's charge to the jury (2825):

> "The government's case against Bottone rests on the knowledge he acquired from Salvetti concerning what was going on concerning these cultures and

processes and Salvetti's relationship with Fox and then with Cancelarich and the Kim boys. This knowledge is found in Bottone's statement in the Merck case in New Jersey [the depositions] and Mr. Phillips' testimony on this trial."

The depositions were voluminous and filled some 18 volumes (2405), and comprised some 400 hours of testimony (2414). They were taken during the months from May until just prior to petitioner's indictment in October of 1962 (2003, 2414, 2416-7). The off-the-record questioning filled some 10 volumes and was conducted over a period beginning June 29, 1962 and continuing through the remaining period during which the depositions were taken (2405-6, 2371).

The depositions were ostensibly taken in connection with a civil suit by the Merck Company against Bottone and his Pan-Med company, for an injunction and damages for alleged patent infringement of one of Merck's products known as Vitamin B-12 (2408-9, 2411, 2415). The suit resulted in a consent decree adjudging Bottone in contempt and awarding damages against him in the sum of $100,000 (2406-07). The Merck Company then entered into an agreement with Bottone dated May 14, 1962, which provided in essence that Merck would accept a payment of $15,000 from Bottone in satisfaction of the $100,000 judgment, provided that he would give a "frank and complete disclosure in depositions under oath of all matters and things within his or . . . [Pan-Med's] knowledge concerning" a specified list of subjects (2407-10). The agreement was conditioned on Merck's "being satisfied of the completeness and frankness of the aforesaid disclosures" (2412-13).

The agreement recited that "Merck believes that Bottone and Panmed have valuable information concerning the activities of various persons and entities in the field of importing, producing, selling and distributing drugs" (2408). The agreement then recited the matters as to which Bottone was to give "frank and complete disclosure", including the matters of improper customs declarations, counterfeiting, mislabeling, *sales by Bottone or any of his organization, associates or others of drugs in the United States or foreign countries, production* in the United States or *overseas of drugs using American know-how or process information,* and persons, associations or companies *engaged in the foregoing* (2411-12).

The agreement was amended by another agreement dated June 20, 1962 between Merck, Bottone and Pan-Med, providing that Merck would be entitled to 293 actual hours of depositions, if the same were required for a "full and complete disclosure of matters defined in the aforesaid agreement". The amendment also noted that up to that date only 60 hours and 22 minutes of depositions had been given, thus revealing that the greater proportion of the 18 volumes of depositions were given from that date through October 1962 (2416-17).

At the time of the interrogation of this petitioner by the attorney Bate, the latter's law firm, Shanley & Fisher, represented American Cyanamid in New Jersey, as well as Merck (2405, 2407). That interrogation, both in the depositions and in the off-the-record questioning, extended far beyond the Vitamin B-12 situation which was the subject matter of the Merck suit, and was clearly designed to uncover and develop evidence for use in the instant prose-

cution, the interrogation specifically including matters which related solely to the theft and transportation of cultures and other property of American Cyanamid underlying this prosecution.

The evidence showed that during the months in which these 28 volumes of statements were taken, and well before their conclusion in October 1962, this petitioner had become a "target" of the Government investigation which culminated in the indictment herein and that the investigation had "focused" upon him as a potential defendant in this case. The evidence further showed that during the period when the statements were taken, and commencing even prior thereto, American Cyanamid, through its attorneys and other representatives, was working closely with the Government for the purpose of obtaining evidence for use in the prosecution of the charges here involved.

It was clear that the attorney Bate, whose law firm represented American Cyanamid as well as Merck, was not interrogating petitioner between May and October 1962, in a "vacuum", without knowledge or contact with the Government, either directly, or indirectly through American Cyanamid, particularly in view of the fact that Bate was aware of the F.B.I.'s activities at least as respects Salvetti (2417-19). The inescapable inference under the circumstances is that Bate was surreptitiously acting as a *de facto* agent for the Government, after the Government's investigation had "focused" on petitioner, to secure evidence for use by the Government against the latter.

Any participation by the Government, whether directly or indirectly, in the interrogation of petitioner by Merck's attorneys under the pressures and processes of Merck's civil

litigation, after petitioner had become the target and focus of the Government's investigation would clearly run afoul of the doctrine of the *Massiah* and *Escobedo* cases (*Massiah* v. *United States,* 377 U.S. 201; *Escobedo* v. *Illinois,* 378 U.S. 478). In *Massiah* it was the surreptitious interrogation of the defendant by a co-defendant, without advising him that the questioning was being pursued for the purpose of securing evidence for the Government, and without apprising him of his constitutional rights to remain silent and to the aid of counsel, that was held to be particularly objectionable (377 U.S. at 206). The same vice was also present here, where petitioner was interrogated, to a large extent in the absence of counsel, and ostensibly for the purposes of a civil litigation, but actually, without his knowledge, for the purpose of securing evidence against him for the Government, for use in the instant prosecution.

The rationale of the Court below that petitioner was "free to claim" his privilege against self-incrimination in the interrogation by Merck "on penalty only of foregoing the financial advantages that performing his agreement to talk would entail" (App. A, *infra,* p. A-12), overlooks the fact that petitioner was never apprised of the purpose of the interrogation, to secure evidence for the Government, and that the deception thus practiced upon him operated to deprive him of any effective opportunity to assert his constitutional rights. Manifestly, an accused cannot be regarded as "free" to claim the privilege when he is tricked into not doing so, particularly where, as in this case, the deception is accomplished through the pressures entailed in the threatened enforcement of a substantial contempt judgment against the accused.

In *Miranda* v. *Arizona*, 384 U.S. 436, 444, this Court declared that the *Escobedo* doctrine is applicable not only where an accused has "been taken into custody" but also where he has been "otherwise deprived of his freedom of action in any significant way". An accused who is interrogated under pressures such as those exerted in this case is certainly "deprived of his freedom of action in . . . [a] significant way".

The Court below went so far as to rule that petitioner was without remedy "even if Merck's attorney were working with the Government" (App. A, *infra*, p. A-12). The ground on which it sought to distinguish the *Massiah* case —i.e., that in *Massiah* the defendant was already under indictment (*id.*, p. A-12)—cannot be squared with the holding of *Escobedo* that the principles applied in *Massiah* are equally applicable even though the accused has not yet been indicted, so long as the Government's investigation has focused upon him and the accusatorial process has thereby begun.

It is further submitted that even if Merck's interrogation of petitioner was conducted without the knowledge, participation or acquiescence of the Government, the statements thereby obtained from him were unavailable to the Government, since they were extracted through pressures and promises rendering them involuntary, and to a substantial extent in the absence of counsel, and by means of subterfuge and deception. The same considerations which call for an exclusionary rule where the Government participates or acquiesces in such objectionable methods of obtaining evidence, are equally applicable where such methods are employed, as here, by a complainant actively en-

gaged in promoting and assisting the Government investigation and prosecution.

Constitutional guarantees could well be rendered meaningless if the Government could blandly adopt for its use in a criminal prosecution the fruits of improper investigatory activities by complainants actively engaged in gathering evidence for it. The situation is comparable to that which was condemned by this Court when it overruled the so-called "silver platter doctrine" and applied a flat exclusionary rule against the use in a Federal court prosecution of evidence tainted by reason of having been obtained in violation of the defendant's rights, albeit by persons other than Federal officials, and without any participation therein by the Federal Government. See *Elkins* v. *United States*, 364 U.S. 206; *Benanti* v. *United States*, 355 U.S. 96.

There is nothing in the record to support the conclusion of the Court below that it is "fairly inferable that Bottone had the advice of counsel when he signed the agreement with Merck" (App. A, *infra*, p. A-12). The Court's further statement that "a lawyer was present during half the civil interrogation and there was nothing to prevent one from assisting throughout if Bottone had wished" (*id.*, p. A-12), ignores the crucial fact that Bottone was deprived of the effective assistance of counsel to protect his constitutional rights, especially as respects that half of the interrogation conducted in the absence of counsel, because neither Bottone nor the attorney was apprised of the intended use, for criminal prosecution purposes, of the answers that Bottone would give in that interrogation.

3. As to the trial court's failure to hold a full hearing concerning the statements obtained from petitioner or to submit to the jury the issue of the voluntariness of such statements.

The question here presented is auxiliary to Question 2, *supra*. If it were to be held that the Government was not foreclosed from using the statements here involved in this prosecution, in the absence of a direct showing that the Government itself had a part in obtaining the statements, petitioner was at least entitled to a hearing to determine the full factual context in which the statements were given and to ascertain whether the Government approved or acquiesced in the attorney Bate's investigatory activities in its behalf. *Cf. Townsend* v. *Sain*, 372 U.S. 293, 313-14, 320-22; *Jackson* v. *Denno*, 378 U.S. 368, 391-2; *Boles* v. *Stevenson*, 379 U.S. 43, 45; *Henry* v. *Mississippi*, 379 U.S. 443, 448. The principle applied in the latter cases is that where the record indicates a violation of a defendant's constitutional rights in connection with the use in evidence against him of a confession or of the fruits of an unreasonable search and seizure, the defendant is entitled to a full evidentiary hearing on the matter, even where the record suggests that counsel might not have entered a specific exception or objection. See, especially, *Henry* v. *Mississippi*, *supra*, 379 U.S. at 448-9; *Boles* v. *Stevenson*, *supra*, 379 U.S. at 111. *Cf.* also *Campbell* v. *United States*, 365 U.S. 85, 94-6, 98.

As has been noted, at the time of the interrogation of this petitioner by the attorney Bate, the latter's law firm, Shanley & Fisher, represented American Cyanamid in New Jersey, as well as Merck (2405, 2407). The trial court, however, rejected a proffer of proof by co-defendant's counsel to show, through Bottone's testimony, additional circum-

stances surrounding that interrogation of Bottone by Bate, that Bate sought to put pressure on Bottone to obtain evidence against his co-defendants by stealing records from Biorganic and by secretly obtaining incriminating statements from the co-defendants through concealed wire recording apparatus (2422-3). The trial court ruled that any evidence with respect to any pressures exerted upon Bottone would have to be developed by calling Bate as a witness (2421-2).

The failure of the Courts below to grant petitioner an evidentiary hearing with respect to the issues of the voluntariness of the statements obtained from him, lack of counsel and self-incrimination, overlooks the principles so recently re-emphasized by this Court in *Johnson* v. *New Jersey*, 384 U.S. 719, and *Davis* v. *North Carolina*, 384 U.S. 737. In *Johnson*, this Court, while declining to give retroactive effect to its decisions in *Miranda* and *Escobedo*, stated as follows (384 U.S. at 730-1):

> "At the same time, our case law on coerced confessions is available for persons whose trials have already been completed, providing of course that the procedural prerequisites for direct or collateral attack are met. See *Fay* v. *Noia*, 372 U.S. 391 (1963). Prisoners may invoke a substantive test of voluntariness which, because of the persistence of abusive practices, has become increasingly meticulous through the years. See *Reck* v. *Pate*, 367 U.S. 433 (1961). That test now takes specific account of the failure to advise the accused of his privilege against self-incrimination or to allow him access to outside assistance. See *Haynes* v. *Washington*, 373 U.S. 503 (1963); *Spano* v. *New York*, 360 U.S. 315 (1959). Prisoners are also *entitled to present evidence anew on this aspect of the voluntariness of their confes-*

sions if a full and fair hearing has not already been afforded them. See *Townsend* v. *Sain,* 372 U.S. 293 (1963). Thus while *Escobedo* and *Miranda* provide important new safeguards against the use of unreliable statements at trial, *the non-retroactivity of these decisions will not preclude persons whose trials have already been completed from invoking the same safeguards as part of an involuntariness claim.*

"... past decisions treated the failure to warn accused persons of their rights, or the failure to grant them access to outside assistance, as factors tending to prove the involuntariness of the resulting confessions. See *Haynes* v. *Washington, supra; Spano* v. *New York, supra.*"

And, "allegations of this kind (denial of counsel) are directly relevant to a coerced confession claim and ... such a claim presents no problem of retroactivity". 384 U.S. at 735.

In *Davis* v. *North Carolina, supra,* involving a pre-*Miranda* trial, this Court also stated (384 U.S. at 740-1):

"... the fact that a defendant was not advised of his right to remain silent or of his right respecting counsel at the outset of interrogation, as is now required by *Miranda,* is a significant factor in considering the voluntariness of statements later made ... Thus, the fact Davis was never *effectively* advised of his rights gives added weight to the other circumstances described below which made his confessions involuntary."

Furthermore, petitioner was entitled to the submission to the jury of the issue of the voluntariness of the statements obtained from him by Merck. This Court has thus declared that the admissibility in evidence of a confession obtained

from an accused depends on whether it is the accused's "free and voluntary" act and that it "must not be extracted by any sort of threats or violence nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence". See *Malloy* v. *Hogan,* 378 U.S. 1, 7 and cases there cited. Manifestly, just as the Government was foreclosed from obtaining any incriminating statement from petitioner through pressures or promises directly made by it, it could not do so indirectly through Merck.

The issue of voluntariness was squarely presented in this case, and it was incumbent on the trial court to submit that issue to the jury, even though the Court may have determined that there was no basis for excluding the statements as involuntary as a matter of law. See *Jackson* v. *Denno, supra,* 378 U.S. 368, 378 (fn. 8, 400; *United States* v. *Lustig,* 163 F. 2d 85, 88-9 (2d Cir.), cert. den. 332 U.S. 775; cf. *United States* v. *Simmons,* 281 F. 2d 354, 356-7 (2d Cir.).

The prosecutor, in his summation to the jury, urged that there was no issue as to the voluntariness of the statements. He thus stated (2688-9):

> "I want to point out one other thing: There has been this claim that Merck and American Cyanamid have been persecuting people, and certain statements were made about that, and I do think something should be said by me about that. * * *
>
> "Merck & Company did not put a gun to Dr. Bottone's head and force him to sign a judgment for $100,000. This was arrived at during the course of litigation and he voluntarily consented to provide certain information rather than pay the money that was adjudicated he owed to Merck & Company. These are not the issues in the case, ladies and gentlemen;

the issues in the case are the facts which you have heard from the witnesses you have seen."

The trial court made no mention in its charge of any issue with regard to the voluntariness of the statements, and failed to instruct the jury that they could consider the facts surrounding the taking of the depositions and the off-the-record questioning of petitioner by Merck's attorney in passing upon the voluntariness of the statements thereby adduced from him. On the contrary, the trial court specifically instructed the jury that the essential element of petitioner's guilty knowledge "is found in Bottone's statement in the Merck case in New Jersey", without any mention of the issue as to the voluntariness thereof (2825). In view of the prosecutor's summation, and in view of the silence of the charge as to this matter, the jury was undoubtedly given the impression that there was no issue as to voluntariness, and the trial court's failure to charge on the subject amounted to a withdrawal of that issue from the jury, and thus commission of "plain error" under Rule 52(b), Fed. Rules Cr. Proc. *Cf. United States* v. *Raub,* 177 F. 2d 312, 315-16 (7th Cir.).

4. As to the governing standards for the determination of "value".

An important question is here presented, involving a conflict among the circuits, relating to the interpretation of the standards laid down in 18 U.S.C. § 2311 for the determination of "value" for the purposes of prosecutions under 18 U.S.C. §§ 2314 and 2315.

Under 18 USC §2311, the term "value" for purposes of prosecutions under 18 U.S.C. §§2314 and 2315 is defined as follows:

> "'Value' means the face, par, or market value, whichever is the greatest, and the aggregate value of all goods, wares and merchandise, securities, and money referred to in a single indictment shall constitute the value thereof."

In *Abbott* v. *United States*, 239 F. 2d 310 (5th Cir.), involving a prosecution for the unlawful transportation of photostats of geophysical maps, the Court held that the Government had failed to establish the requisite element of a value in excess of $5,000 because of its failure to show either a market, or a market value, for the materials involved, as required by 18 U.S.C. §2311. The Court there further held that it was error to permit testimony, on the question of value, as to the cost to the company for the geophysical exploratory work represented by the maps "or its 'value' to oil lease traders and promoters working up trades for that area", since even if such evidence served to show "intrinsic or actual value, . . . it was certainly not market value" (239 F. 2d at 312).

The Court further stated (239 F. 2d at 313):

> "Congress plainly restricted value to three well-understood standards. Mere cost of production, cost of replacement, value to the owner, value to one who might have use of it under certain special circumstances, whatever else it might be, is not market value. For that value—market—depends on a market, whether formal or informal, in which willing buyers bargain with willing sellers."

In the present case, on the other hand, the District Court permitted the jury to consider, over motion to strike (2166, 2178), extensive evidence as to the cost of production, the

cost of replacement, and the value to Cyanamid, of the latter's cultures and procedures, as well as evidence relating to the element of secrecy with respect thereto. The admission of such evidence was directly contrary to the standards laid down in *Abbott* v. *United States, supra.*

The trial court further admitted evidence, over motion to strike (2166, 2178), showing the amounts offered by other companies in Europe for cultures and processes of the *type* here involved, even though there was no proof that the particular cultures and processes involved in those transactions were the same as those actually dealt in by the defendants herein. Manifestly, no sufficient foundation was laid to establish the relevance of such evidence, in view of the absence of a showing that the transactions with such other companies related to cultures or "documents" substantially the same as those involved in this case. A further objection to such evidence was that the value of such materials to a particular buyer could well turn on "special circumstances" affecting such buyer (cf. *Abbott* v. *United States, supra,* 239 F. 2d at 313). The evidence here thus showed that marketable drugs could be produced with materials of the kind here involved only under the special circumstances of there being available to the purchaser a special type of plant with special equipment for precise control of the processes and precise data for such control (1803-4, 1952-3, 2043).

The District Court indeed charged the jury that in determining value they could consider the transactions that were testified to involving other companies, even though such transactions were not consummated (2793-4). The Court further charged the jury that they could consider "the cost

to American Cyanamid for the development of the various organisms and the documents dealing with manufacturing procedures'' (2794), even though, as pointed out below (*infra*, pp. 51-4), the particular organisms involved in this case were not shown to have been effective or of any value, and even though the ''documents'' here involved were for the most part not even copies of Lederle documents. The Court also charged the jury that they could consider ''the secrecy attendant upon this work and the desires of other people to obtain the results of this work'' (2794).

The standards thus applied by the District Court do not comport with the definition of value set forth in the statute. Cf. *Abbott* v. *United States, supra*, 239 F. 2d at 312-13.

The Court of Appeals below, however, declined to follow the decision of the Fifth Circuit in *Abbott*, stating that ''we prefer the contrary Third Circuit holdings in *United States* v. *Seagraves, supra*, 265 F. 2d at 880, and *United States* v. *Lester, supra*, 282 F. 2d at 754-55'' (App. A, *infra*, p. A-7).

While the Third Circuit Court of Appeals in *United States* v. *Lester*, 282 F. 2d 750, held, with respect to geophysical maps, that ''any reasonable method'' could be employed to determine the value of an item not having a market value, it is submitted that the decision in *Abbott* v. *United States, supra*, is more in consonance with the language of the governing statute and should here be followed. Further, in the *Lester* case, there was testimony by expert witnesses that the aggregate value of the stolen maps ''was well over $5,000'' (282 F. 2d at 754). There was no comparable evidence in the instant case.

5. As to the insufficiency of the evidence of guilty knowledge on the part of petitioner.

It is submitted that the holding of the Court of Appeals below on the question of the sufficiency of the evidence adduced to show petitioner's knowledge that the materials involved in this case had been stolen, or stolen from Lederle, on its face directly contravenes the principle enunciated by this Court in *Ingram* v. *United States*, 360 U.S. 672, is contrary to the uniform holdings of other circuits in analogous situations, and, indeed, is based on sheer speculation.

In *Ingram*, this Court reversed the convictions of two petitioners (Smith and Law), on the ground that the evidence as to them was legally insufficient to show that they had certain knowledge requisite for conviction there, to wit, knowledge that their employers were liable for federal taxes by reason of certain gambling operations in which Smith and Law had participated. In that case, as here, the record was barren of any direct evidence of the requisite knowledge on the part of the two employees whose convictions were reversed. This Court held that the essential element of knowledge was not established by the Government's showing that the two functionaries were actively engaged in the gambling operations there involved and that they conducted such operations furtively and in secret. The Court stated in part as follows (360 U.S. at 680):

> "Evidence that Smith and Law might have wanted the taxes to be evaded *if* they had known of them, and that they engaged in conduct which could have been in furtherance of a plan to evade the taxes *if* they had known of them, is *not* evidence that they *did* know of them.
>
> * * * * *

> "... to establish the (element of criminal) intent, the evidence of knowledge must be clear, not equivocal."

The evidence adduced as to petitioner was summarized by the Court of Appeals below in its opinion (App. A, *infra*, p. A-5, n. 3; and see *supra*, pp. 15-21). As the Court there acknowledged (App. A, *infra*, p. A-5), the Government adduced no direct testimony that Bottone was aware that the Lederle materials had been stolen therefrom and, although the Government relied heavily upon certain statements made by the thieves at a meeting on April 14, 1961 to show the requisite knowledge on Bottone's part, "it was not proved that this was heard by Bottone, who arrived late." (App. A, *infra*, n. 3, at p. A-6). The Court held, however, that the Government met its burden of proving the requisite guilty knowledge on Bottone's part through "the evidence of his participation in discussions as to disposition of the goods and of his substantial role in facilitating transportation abroad, of both cultures and participants"—or, as the Court summarized it, "all this evidence of his comings and goings" (App. A, *infra*, pp. A-5—A-6).

The Court's own above-quoted characterization of the evidence demonstrates its insufficiency to establish the vital element of guilty knowledge. As in *Ingram*, so here, evidence that petitioner "might have" conducted himself as described "*if* (he) had known" that the materials had been stolen, or that he "engaged in conduct which *could* have been in furtherance of a plan" as alleged in the indictment "if (he) had known" of such plan, "is *not* evidence that (he) *did* know" such facts. *Cf. Ingram* v. *United States*, *supra*, 360 U.S. at 680.

Indeed, the clear implication of the reasoning of the Court below here—that petitioner's "comings and goings" constituted sufficient evidence upon which to infer the requisite guilty knowledge on his part—is directly analogous to a Government argument rejected in *Ingram*.

The Government thus argued in *Ingram* that the evidence showing that Smith and Law were intimately connected with the lottery operation itself, that they cooperated in conducting it secretly and that they had knowledge that the operation was conducted at a profit, circumstantially proved that they knowingly aided in the avoidance of their employers' gambling tax liability. Rejecting that contention, this Court held that "these circumstances actually are colorless as to the vital issue of knowledge on the part of Smith and Law that their superiors owed federal wagering taxes. Certainly the secrecy of the operation did not go to show that knowledge. This is not a case where efforts at concealment would be reasonably explainable only in terms of motivation to evade taxation. Here, the criminality of the enterprise under local law provided more than sufficient reason for the secrecy in which it was conducted." (360 U.S. at 679.)

Similarly, in the instant case, the evidence of Bottone's "comings and goings" fails to meet the test of being that "clear, not equivocal" evidence which is required as a predicate for a permissible inference of the requisite guilty knowledge and intent. Bottone's activities were not "reasonably explainable only in terms of" his knowing that stolen Lederle materials were being dealt in; on the contrary, the circumstances of his activities render them "actually . . . colorless as to the vital issue of knowledge" on his part that such materials were being deal in.

It has likewise been uniformly held in other circuits that a finding of a defendant's guilty knowledge may not rest upon speculative inferences or possibilities, and that evidence which serves merely to create "a strong suspicion" of such guilty knowledge is not sufficient for that purpose, particularly where there is a reasonable explanation for the defendant's actions equally consistent with the absence of such knowledge: *Call* v. *United States,* 265 F. 2d 167, 172 (4th Cir.); *United States* v. *Hamrick,* 293 F. 2d 468, 470-471 (4th Cir.); *Brumbelow* v. *United States,* 323 F. 2d 703, 705 (10th Cir.); *Jehl* v. *United States,* 127 F. 2d 585 (9th Cir.); *Karchmer* v. *United States,* 61 F. 2d 623 (7th Cir.); *Neal* v. *United States,* 102 F. 2d 643 (8th Cir.).

It has thus been held that an inference of guilty knowledge may not be drawn merely on the basis of a showing that the evidence indicated a *possibility* that the defendant had been apprised of the underlying facts by a co-defendant (*Call* v. *United States, supra,* 265 F. 2d at 172); or that the defendant was engaged in other illegal activities in association with the other defendants (*Call* v. *United States, supra; Duke* v. *United States,* 233 F. 2d 897 [5th Cir.]); or that he had general knowledge of the situation (*Fulbright* v. *United States,* 91 F. 2d 210, 213 [8th Cir.]); or that he had dealings involving the stolen property and derived personal gain therefrom (*Gable* v. *United States,* 84 F. 2d 929, 930 [7th Cir.]); or that he made contradictory statements relating to the circumstances surrounding his dealings (*Fulbright* v. *United States, supra,* 91 F. 2d at 213). The courts have similarly consistently rejected any concept of "guilt by association". See *Glover* v. *United States,* 306 F. 2d 594, 595 (10th Cir.) and cases there cited.

The evidence showed that legitimate independent development of the pharmaceuticals here involved was perfectly feasible and that, so far as petitioner was concerned, the various cultures shown to have been dealt in by the witnesses and the other defendants could have been independently developed from samples legitimately obtained from a public depository; and there was nothing whatever to show that petitioner knew that such cultures had been stolen from Lederle (see *supra*, pp. 12-13, 14). The Government's entire case against petitioner Bottone rested on nothing more than sheer speculation and on piling "inference upon inference", in each instance drawn from evidence which is at best "equivocal" and not at all "clear" (*Ingram* v. *United States, supra,* 360 U.S. at 680), and which is "equally consistent" with Bottone's not possessing the requisite guilty knowldege. *United States* v. *Reina,* 242 F. 2d 302, 306 (2d Cir.).

6. As to the evidence required to prove the value of a pharmaceutical culture in a prosecution under 18 U.S.C. §2314.

An important question of general applicability is here presented relating to the proof necessary to establish the essential element of "value" in a prosecution, under 18 U.S.C. § 2314, for transporting stolen "goods," where the value of the goods involved is determined by its condition at the time of its transportation.

Count 9 of the indictment charged petitioner Bottone with having unlawfully transported a quantity of stolen CTC producing microorganisms of a value of $5000 and more, in foreign commerce, from New York to Milan, Italy, in September 1961, with knowledge that the same had been

stolen. As indicated above (pp. 29-30), the Court below held that, even if error was committed as to counts 8 and 10, the judgment could stand on the basis of the conviction on count 9.

There was however an absence of legally sufficient evidence to show that the package which Bottone delivered contained a microorganism having any value, much less a value of $5000 or more, at the time of the transportation in September 1961, quite apart from the failure of proof on the issues of whether it was in fact a Lederle organism which was stolen or transported, and, if so, whether Bottone knew it to be such. There was thus no evidence to show that the certain mash sample which Gerace had stolen in July 1961, and which the Government maintained was the source of the culture transported as alleged in count 9, actually contained any live organisms, no test having been made to determine the presence, viability or potency of any microorganism content. The witness, Fine, who transmitted the mash from Gerace to Sharff, himself had no way of knowing whether what he had obtained from Gerace was a live CTC culture (1614-1615).

In fact, the evidence affirmatively showed that, without a test, there was no way of knowing whether there were any live cultures in the mash sample taken from Lederle by Gerace and given by him to Fine. The Government's own "expert" witness, Dr. Scholz of Lederle, thus testified that the cultures in the mashes are "not necessarily" growing there, "They might be dead. It might be a kill culture" (1988-89). Fox similarly testified that, even as to "lyophiles" of CTC cultures at Lederle it was possible that among them were cultures which were "not good" (518, 520).

Furthermore, even if it were to be assumed that the mash sample stolen by Gerace from Lederle contained valuable microorganisms at the time of the initial taking, there was an absence of evidence to establish that such microorganisms were still in good condition at the time that the package allegedly containing them was delivered to Bottone in September 1961. The Government witness Fine testified that at the time that he delivered the sample to Sharff he actually did not know whether it was still effective (1642). He further testified that CTC mash samples, such as he delivered to Sharff, could be fatally contaminated by contact with the air, and that it was possible that the sample which he testified he delivered to Sharff in July 1961 was contaminated (1642). The evidence also showed that unless the mash sample were immediately properly preserved, the material would die and be completely worthless, within six hours, even if kept in a refrigerator; that the proper steps had to be taken "at once" for preservation of the material or "the sample would be destroyed" (2750, 2751). Prior to lyophilization the material had to be kept in a "deep freeze" (2751). The danger to these delicate microorganisms was also illustrated by the prior experience in dealing with them; thus, on many occasions microorganisms furnished by Biorganic to Ankermann had proved to be poor by the time they reached Ankermann and provided low yields occasioning frequent complaints by Wawretschek (688, 733).

As regards the particular mash sample stolen by Gerace, the evidence showed that the sample was handled in such a manner that it could well have been fatally contaminated by contact with the air by the time it reached Sharff. Gerace thus left the sample on his laboratory bench for an indeter-

minate time until he left work on the day of the taking; he then carried it home in his pocket in the hot July weather; and there was further handling of the sample by Fine, without refrigeration, until he delivered it to Sharff (1735-36, 1639). There was likewise no showing that Sharff had taken the requisite steps for the proper preservation of the material after it had been turned over to him by Fine. The Government contended that it could be inferred that Sharff had, in accordance with his practice on other occasions, lyophilized the particular CTC microorganisms upon receiving the mash sample from Fine. There was nothing, however, to show that the microorganism was still alive when Sharff received it, or whether he did actually lyophilize it, or whether there was any lapse of time prior to any lyophilization, or whether the lyophilization was properly carried out.

Further, the evidence showed that when the CTC microorganism apparently contained in the package transported by petitioner to Ankermann in September 1961, was tested on a laboratory scale by Cancelarich around mid-December 1961, with large scale production to follow if the tests were successful, that microorganism "was never used" and no CTC went into production from that source (*supra*, p. 21). Not only was there thus no evidence that what Bottone transported in September 1961 was then a valuable microorganism, but on the contrary what evidence there was showed that that microorganism was found to be unfit for production, and thus of no value, when tested in December 1961, and there was nothing to show that there was any change in the condition of the microorganism between the time of the transportation in September 1961 and the tests conducted in December 1961.

There was in short a complete absence of evidence to show that the package transported by Bottone contained microorganisms having any value, much less a value of $5000, at the time of the transportation. The Government's claim of value is based on nothing more than sheer speculation, since, as noted, there was no showing with respect to the condition of the microorganisms at any of the crucial times here involved, except for the evidence showing that the culture, upon being tested after its delivery by Bottone, demonstrated that it was unfit for production. At best, the Government's evidence would be no more than "equally consistent" with an inference that the damage occurred to the microorganisms at some point prior to the subject transportation as with an inference that such damage occurred between the time of that transportation and December 1961. See *United States* v. *Reina*, 242 F. 2d 302, 306 (2d Cir.); *Karchmer* v. *United States*, 61 F. 2d 623 (7th Cir.); *Brumbelow* v. *United States*, 323 F. 2d 703, 705 (10th Cir.).

7. Incorporation of Reasons for Granting the Writ advanced in petitions of co-petitioners.

As to the Question presented in the petition of co-petitioner Seymour Salb and Question 3 presented in the petition of co-petitioner Nathan Sharff, petitioner herein incorporates by reference the reasons advanced in such petitions for granting a writ of certiorari with respect to such Questions.

CONCLUSION

For all of the reasons advanced, this petition for a writ of certiorari should be granted.

Respectfully submitted,

ARTHUR KARGER
Counsel for Petitioner
600 Madison Avenue
New York, N.Y. 10022

ALFRED DONATI, JR.,
Co-Counsel.

APPENDIX A

Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 436—September Term, 1965.

(Argued June 23, 1966 Decided August 4, 1966.)

Docket No. 30343

UNITED STATES OF AMERICA,

Appellee,

—v.—

CAESAR BOTTONE, SEYMOUR SALB, and NATHAN SHARFF,

Appellants.

Before:

MOORE, FRIENDLY and FEINBERG,

Circuit Judges.

Appeals from a judgment of the District Court for the Southern District of New York, Charles M. Metzner, *Judge*, convicting defendants, after a verdict, of interstate and foreign transportation of cultures and documents stolen, converted or taken by fraud in violation of 18 U. S. C. §2314, and of conspiring to do so in violation of 18 U. S. C. §371. Affirmed.

MOSES POLAKOFF, New York, N. Y. (Van Riper & Belmont, Newark, N. J.; Walter D. Van Riper, of Counsel; Theodore M. Wolkof, New York, N. Y., on brief), *for Defendants-Appellants Salb and Sharff.*

ALFRED DONATI, JR. (Zoloto, Karger & Zurkow, New York, N. Y.; Arthur Karger, of Counsel), *for Defendant-Appellant Bottone.*

DANIEL R. MURDOCK (Robert M. Morgenthau, United States Attorney for the Southern District of New York; John S. Martin, Jr., Stephen F. Williams, John E. Sprizzo, Assistant United States Attorneys), *for the United States of America.*

FRIENDLY, *Circuit Judge:*

The convictions here under appeal stem from a scheme for the massive extraction from Lederle Laboratories, a division of American Cyanamid Company located in Pearl River, N. Y., of microorganisms used in the production of three antibiotics and a steroid,[1] and instructions for the drugs' manufacture. Although the drugs were covered by patents and specimen cultures were required to be deposited in collections available for purchase by the public at minimal cost, improved strains of the microorganisms and detailed manufacturing processes developed by Lederle which

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[1] The antibiotics were tetracycline (TC), sold as Achromycin; chlortetracycline (CTC), sold as Aureomycin; and demethychlortetracycline (DMCTC), sold as Declomycin. The steroid was triamcinolone, sold as Aristocort.

were not in the public domain offered vastly greater output from the same physical plant. The combination of this with the lack of patent protection in certain foreign countries created a market for stolen cultures and secret processes and furnished a substantial incentive for theft to disloyal employees and persons willing to do business with them. The enterprise that was the subject of this indictment involved stealing and preserving cultures Lederle had developed, temporarily removing and copying documents that outlined manufacturing procedures, and then selling the cultures and the copies primarily for ultimate exportation to Europe. As in so many criminal trials, the Government's case was presented mainly through the chief culprits, two former Lederle employees, Sidney Fox and John Cancelarich, and their lieutenant, Leonard Fine, all of whom pleaded guilty to the charges against them and were rewarded for their cooperation with light sentences of six months' imprisonment.[2] The serious crimes charged against the appellants, Salb, Sharff and Bottone, were on the receiving end.

The trial was in the District Court for the Southern District of New York before Judge Metzner and a jury. The counts submitted, on which appellants were found guilty and given two-year concurrent sentences, were in summary as follows:

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[2] Joseph Gerace, a lesser accomplice, who also testified for the Govermnent, received a suspended sentence.

Number	*Charge*	*Appellants*
1	Transporting CTC cultures and related documents from Spring Valley, N. Y., to East Paterson, N. J., on November 11, 1959.	Salb Sharff
8	Transporting TC, CTC, DMCTC and triamcinolone cultures and related documents from New York to Rome, Italy, on April 16, 1961.	Bottone Salb Sharff
9	Transporting CTC culture from New York to Milan, Italy, on September 15, 1961.	Bottone Sharff
10	Conspiracy to steal, transport and sell cultures and related documents from March 1958 to July 1964.	Bottone Salb Sharff

Appellants' prolix briefs reargue the evidence in a manner that would scarcely be convincing to a jury and is wholly misplaced before an appellate court. Counsel ought to understand the futility of tedious efforts to show that each piece of testimony is suspectible of an innocent interpretation if it stood alone. The trier is entitled, in factbound, to consider the evidence as a whole; and, in law as in life, the effect of this generally is much greater than of the sum of the parts. Cf. *United States* v. *Monica*, 295 F. 2d 400, 401-02 (2 Cir. 1961); cert. denied, 368 U. S. 953 (1962). Indeed we find simply frivolous the attempt to

demonstrate insufficiency by Salb and Sharff, who, as proprietors of Biorganic Laboratories of East Paterson, N. J., had begun illicit dealings with Fox in stolen Lederle cultures as early as the winter of 1958, continued their purchases of microorganisms and documents for more than two years, and then switched their custom to Cancelarich after he had acquired most of Fox' collection of Lederle cultures and records. Although Bottone entered the conspiracy at a later stage and the Government adduced no direct testimony that he had heard the cultures and documents described as stolen from Lederle, the evidence of his participation in discussions as to disposition of the goods and of his substantial role in facilitating transportation abroad of both cultures and participants, which we summarize in the margin,[3] amply met the Government's burden. To

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[3] Bottone's first significant appearance was in June 1960 when Sharff and Salb were endeavoring to persuade Fox it would be dangerous for him to sell the stolen materials by himself. They placed a fake advertisement seeking information in a trade paper under the name of a Dr. Angelo Mancuso, with the address of Sharff's brother-in-law. Fox answered the ad and met in London with a business associate of Bottone, Salvetti, who masqueraded as Dr. Mancuso. Salvetti telephoned Bottone who was then in Italy and, saying he had just met with a group that had closed a big deal which he had to stop, asked Bottone to cable him in London that Interpol was investigating the theft of Lederle trade secrets. Bottone sent the cable, left for London in the middle of the night, and secretly observed Salvetti show the cable to Fox. Afterwards Salvetti told Bottone he wanted to stop Fox' deal so that he might offer the same information and microorganisms at a lower price. In March 1961 Bottone had a visit in Berlin with Wawretschek, head of a Milan pharmaceutical firm, Ankermann, which had been a purchaser of the stolen cultures and processes; Wawretschek complained about the quality of the microorgansims and suggested a new deal whereby Salb, Sharff, Salvetti and Bottone would buy into his company. Bottone telephoned this proposal to Salvetti in Rome; on April 10 the American group executed a purchase contract in New Jersey, with Salvetti signing in Bottone's behalf. On April 14 Fine and Salvetti drove Cancelarich from Salvetti's apartment in Bronxville, N. Y., to Biorganic to discuss Cancelarich's employment at Ankermann with Salb, Sharff and Bot-

hold that the jury could not be convinced from all this evidence of his comings and goings that Bottone knew what was about, would require a greater degree of credulity than even such "naif, simple-minded men" as appellate judges, see Holmes, Collected Legal Papers 295 (1920), can be expected to possess. And we are wholly unimpressed by the criticisms now made of the judge's summary of this evidence, to which counsel took no exception at the time. See *United States* v. *Kahaner*, 317 F. 2d 459, 478-79, 482 (2 Cir.), cert. denied, 375 U. S. 836 (1963).

The only serious point of law raised by appellants is whether the transportation of papers describing the Lederle processes constituted the transportation in interstate or foreign commerce of "any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converetd or taken by fraud."

---

tone. Cancelarich made a full revelation of his own thieveries and his possession of Fox' collection of Lederle cultures and processes, but it was not proved that this was heard by Bottone, who arrived late. Two days later Bottone drove Cancelarich from Fort Lee, N. J., to Kennedy Airport and bought him a ticket to Italy; Cancelarich carried stolen cultures and papers describing Lederle's processes. Bottone subsequently flew to Milan and in May introduced Cancelarich to a Dr. Marpurgo, representing a Milan firm called MIBA, who was interested in buying a DMCTC process. Cancelarich promised to furnish this for $60,000, which he agreed to split with Bottone who said he would split his share with Salvetti. The culture and processes furnished MIBA were stolen from Lederle. Somewhat later Bottone drove Fine, equipped with stolen Lederle cultures and documents destined for Ankermann, from New Jersey to Kennedy Airport and bought him a ticket to Italy. Fine and Marpurgo subsequently reported to Bottone's MIBA's success with the processes supplied by Cancelarich. In July Bottone financed a trip to Italy for Fine whom he asked to collect $2,000 of his share from Marpurgo. Finally, in September 1961 Bottone, at Sharff's request, took a CTC culture from New York to Milan for delivery to Wawretschek, telling him that the package contained strains coming from Fine.

18 U. S. C. §2314. The problem is not any doubt on our part that papers describing manufacturing procedures are goods, wares, or merchandise, as was held with respect to geophysical maps in *United States* v. *Seagraves,* 265 F. 2d 876 (3 Cir. 1959), and *United States* v. *Lester,* 282 F. 2d 750 (3 Cir. 1960), cert. denied, 364 U. S. 957 (1961). Neither do we have any concern over the value of these papers, since we dismiss out of hand the contentions that secret processes for which European drug manufacturers were willing to pay five and six figures and in whose illicit exploitation appellants eagerly invested a large portion of their time and an appreciable amount of their fortunes were not worth the $5,000 required to subject them to federal prosecution, see *United States* v. *Schaffer,* 266 F. 2d 435, 440 (2 Cir. 1959), aff'd, 362 U. S. 511 (1960), or that the judge committed any prejudicial error in his submission of that issue to the jury. If *Abbott* v. *United States,* 239 F. 2d 310, 312-13 (5 Cir. 1956) is to be considered as ruling out evidence of value in a thieves' market, we prefer the contrary Third Circuit holdings in *United States* v. *Seagraves, supra,* 265 F. 2d at 880, and *United States* v. *Lester, supra,* 282 F. 2d at 754-55. The serious question is whether, on the facts of this case, the papers showing Lederle processes that were transported in interstate or foreign commerce were "goods" which had been "stolen, converted or taken by fraud" in view of the lack of proof that any of the physical materials so transported came from Lederle's possession. The standard procedure was for Fox and Cancelarich to remove documents from Lederle's files at Pearl River, N. Y., take these to Fox' home within New York state, make photocopies, microfilms or

notes, and then restore the purloined papers to the files; only the copies and notes moved or were intended to move in interstate or foreign commerce. The case differs in this respect from the Third Circuit cases of *Seagraves* and *Lester* where, as the records on appeal show, the photostats and tracings delivered by the Gulf Oil geologist were the property of the company, having been made in the company's office, on its paper and with its equipment.

We are not persuaded, however, that a different result should obtain simply because the intangible information that was the purpose of the theft was transformed and embodied in a different physical object. To be sure, where no tangible objects were ever taken or transported, a court would be hard pressed to conclude that "goods" had been stolen and transported within the meaning of §2314; the statute would presumably not extend to the case where a carefully guarded secret formula was memorized, carried away in the recesses of a thievish mind and placed in writing only after a boundary had been crossed. The situation, however, is quite different where tangible goods are stolen and transported and the only obstacle to condemnation is a clever intermediate transcription or use of a photocopy machine. In such a case, when the physical form of the stolen goods is secondary in every respect to the matter recorded in them, the transformation of the information in the stolen papers into a tangible object never possessed by the original owner should be deemed immaterial. It would offend common sense to hold that these defendants fall outside the statute simply because, in efforts to avoid detection, their confederates were at pains to restore the

original papers to Lederle's files and transport only copies or notes, although an oversight would have brought them within it. We have been instructed to "free our minds from the notion that criminal statutes must be construed by some artificial and conventional rule." *United States* v. *Dege*, 364 U. S. 51, 52 (1960) (Frankfurter, *J.*), quoting *United States* v. *Union Supply Co.*, 215 U. S. 50, 55 (1909) (Holmes, *J.*). See also *United States* v. *Sullivan*, 332 U. S. 689, 693-94 (1948); *United States* v. *Bramblett*, 348 U. S. 503, 509-10 (1955); *United States* v. *Turley*, 352 U. S. 407, 412-13 (1957). Such considerations have particular force when, as here, the defendants could not have doubted the criminal nature of their conduct, and the sole issue is whether they subjected themselves to punishment by the United States as well as by a state.

Alternatively, we accept the Government's suggestion that the judgment may stand even if the statute does not reach far enough to include the copies and notes. Each count included and the evidence showed the transportation of cultures which were stolen "goods" on any view. The problem whether the copies and notes of Lederle documents were also within the statute arises only because substantive counts 1 and 8 and conspiracy count 10 charged the transportation both of cultures and of documents and the jury made no finding that the cultures alone were worth $5,000, although it would have been quite justified in doing so. But, says the Government, count 9 charged only transportation of a stolen CTC culture which the jury necessarily found worth the statutory minimum in convicting Sharff and Bottone and in view of the concurrent sentences we need not go further as to them. And Salb's conviction

should also stand since the transportation of the culture charged in count 9 was in furtherance of the conspiracy alleged in count 10 and the journey was one of the overt acts. In accepting this argument here we would not wish to be understood as giving all-out obeisance to the validation of concurrent sentences by the presence of one or more good counts, see *Lawn* v. *United States,* 355 U. S. 339, 359-62 (1958); despite frequent reliance on this principle where appropriate, we adhere to Judge Clark's statement that we will reverse for a material error on another count "whenever the nature of the error committed below or other circumstances suggest that the accused might have received a longer sentence than otherwise would have been imposed, or that he has been prejudiced by the results of the proceedings." *United States* v. *Hines,* 256 F. 2d 561, 563 (2 Cir. 1958); cf. *United States* v. *Barash,* —— F. 2d ——, —— (2 Cir. 1966). But this is not such a case. The error —if there was one—went only to including the papers in the determination of value under counts 1, 8 and, by reference, the conspiracy count, and, as said in *United States* v. *Schaffer, supra,* 266 F. 2d at 440:

> "The only reason for the $5,000 limitation is to avoid overtaxing the Department of Justice. There is no legitimate interest of [defendants] . . . which the Congress sought to protect by this requirement."

We have not the slightest question that the jury would have properly convicted on all counts if only the transportation of cultures had been charged, and the papers had been relied on simply as demonstrating the scope of the criminal enterprise and as enhancing the value of the microorgan-

isms. Judge Metzner's remarks on imposing sentence show that he viewed defendants' activities as a whole, and the two-year concurrent sentences were modest as compared to the permitted maximum of ten years imprisonment, a $10,000 fine, or both, on each substantive count, 18 U. S. C. §2314, or the five years imprisonment, $10,000 fine or both, on the conspiracy count, 18 U. S. C. §371.

The only other point meriting discussion, and that somewhat questionably, is Bottone's objection to the Government's being allowed to use a deposition and a memorandum of further interrogatoin in a civil action. Merck & Co. had obtained a consent judgment of $100,000 in the District Court for New Jersey against Bottone for infringement of its patent on Vitamin B-12. In May 1962 it entered into an agreement, amended a month later, whereby it would accept $15,000 in satisfaction of the judgment if Bottone would give a "frank and complete disclosure in depositions under oath of all matters and things" within his knowledge on a specified list of subjects. Bottone claims that government investigation had "focused" upon him before the bulk of the interrogation, see *Escobedo* v. *Illinois*, 378 U. S. 478, 490 (1964), that his answers were extracted by pressure and subterfuge on the part of Merck's New Jersey attorney who also represented American Cyanamid in that state, and that much of the interrogation was conducted without Bottone's counsel being present. Therefore, he insists, use of his answers at trial should have been barred as in violation of Fifth and Sixth Amendment rights, or that at least he should have been given a hearing to prove that Merck's lawyer was acting in part at the Government's behest.

Putting to one side the Government's substantial claims that these points were not sufficiently raised below, we find them wholly without merit. In no conceivable way was Bottone "compelled . . . to be a witness against himself." He freely consented to the interrogation, for his own benefit, to rid himself of a liability for $85,000; if the questioning touched on matters tending to incriminate him, he was free to claim the privilege on penalty only of foregoing the financial advantages that performing his agreement to talk would entail. Since he was not in custody, the rules laid down in *Miranda* v. *Arizona*, —— U. S. —— (1966), have no application even if Merck's attorney were working with the Government—quite apart from this having been a pre-*Miranda* trial. See *Johnson* v. *New Jersey*, —— U. S. —— (1966). In any event, not only is it fairly inferable that Bottone had the advice of counsel when he signed the agreement with Merck but a lawyer was present during half the civil interrogation and there was nothing to prevent one from assisting throughout if Bottone had wished. Moreover, in contrast to *Massiah* v. *United States*, 377 U. S. 201 (1964), no "criminal prosecution" against Bottone had been commenced at the time of the questioning, and *Miranda* appears to teach that the references in *Escobedo* v. *Illinois*, *supra*, to the need for counsel in the period prior to initiation of the criminal process were solely concerned with the need for a lawyer to counteract the coercion thought to be inherent in in-custody interrogation.

Affirmed.

APPENDIX B

Statutes and Rule Involved

Title 18, United States Code, Section 2311:

"§2311: Definitions

As used in this chapter:

* * * * *

'Value' means the face, par, or market value, whichever is the greatest, and the aggregate value of all goods, wares and merchandise, securities, and money referred to in a single indictment shall constitute the value thereof."

Title 18, United States Code, Section 2314:

"§2314: Transportation of stolen goods, . . .

Whoever transports in interstate or foreign commerce any goods, wares, merchandise, . . ., of the value of $5,000.00 or more, knowing the same to have been stolen, converted or taken by fraud;

* * * * *

Shall be fined not more than $10,000.00 or imprisoned not more than ten years, or both. * * * ".

Title 18, United States Code, Section 2315:

"§2315: Sale or receipt of stolen goods, . . .

Whoever receives, conceals, stores, barters, sells, or disposes of any goods, wares, or merchandise, . . . of the value of $5,000.00 or more, . . ., moving as, or which are a part of, or which constitute interstate or foreign commerce, knowing the same to have been stolen, unlawfully converted or taken;

* * * * *

Shall be fined not more than $10,000.00 or imprisoned not more than ten years, or both. * * * ”

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 52. Harmless Error and Plain Error

* * * * *

(b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

APPENDIX C

Judgment of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the fourth day of August one thousand nine hundred and sixty-six.

Present:

HON. LEONARD P. MOORE,
HON. HENRY J. FRIENDLY,
HON. WILFRED FEINBERG,

Circuit Judges.

United States of America,

Plaintiff-Appellee,

v.

Caesar Bottone, Seymour Salb and Nathan Sharff,

Defendants-Appellants,

John Cancelarich, Leonard Fine, Sidney Martin Fox, Maurice Rosenblatt, Elio Salvetti, and Nicolo Visconti di Madrone,

Defendants.

Appeal from the United States District Court for the Southern District of New York.

Appendix C—Judgment of the United States Court of Appeals

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. Daniel Fusaro
Clerk

By /s/ Vincent A. Carlin
Chief Deputy Clerk

APPENDIX D

Order Denying Petition for Rehearing, etc.

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twentieth day of September, one thousand nine hundred and sixty-six.

Present:

HON. LEONARD P. MOORE,
HON. HENRY J. FRIENDLY,
HON. WILFRED FEINBERG,

Circuit Judges.

United States of America,

Plaintiff-Appellee,

v.

Caesar Bottone, Seymour Salb and Nathan Sharff,

Defendants-Appellants,

John Cancelarich, Leonard Fine, Sidney Martin Fox, Maurice Rosenblatt, Elio Salvetti, and Nicolo Visconti diMadrone,

Defendants.

A petition for a rehearing having been filed herein by counsel for the appellant Caesar Bottone,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

/s/ A. DANIEL FUSARO
Clerk

APPENDIX E

Order Denying Petition for Rehearing In Banc

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twentieth day of September, one thousand nine hundred and sixty-six.

Present:

HON. STERRY R. WATERMAN,
HON. LEONARD P. MOORE,
HON. HENRY J. FRIENDLY,
HON. J. JOSEPH SMITH,
HON. IRVING R. KAUFMAN,
HON. PAUL R. HAYS,
HON. ROBERT P. ANDERSON,
HON. WILFRED FEINBERG,

Circuit Judges.

United States of America,

Plaintiff-Appellee,

v.

Caesar Bottone, Seymour Salb and Nathan Sharff,

Defendants-Appellants,

John Cancelarich, Leonard Fine, Sidney Martin Fox, Maurice Rosenblatt, Elio Salvetti, and Nicolo Visconti diMadrone,

Defendants.

Appendix E—Order Denying Petition for Rehearing In Banc

A petition for a rehearing in banc having been filed herein by counsel for the appellant Caesar Bottone,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

Clerk

SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
OCT 18 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 698

SEYMOUR SALB,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOSES POLAKOFF
Counsel for Petitioner
475 Fifth Avenue
New York, New York

ALAN M. DERSHOWITZ
GRACE POLK STERN
of Counsel
Langdell Hall
Cambridge, Massachusetts 02138

32 CASE PRESS INC., 421 Hudson St., N.Y.—ORegon 5-4540

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IN THE

Supreme Court of the United States

October Term, 1966

No.

SEYMOUR SALB,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above entitled case on August 4, 1966, rehearing denied, September 20, 1966.

Opinions Below

The opinion of the Court of Appeals is not yet reported and is printed as Appendix A. The transcript of the sentencing proceeding is printed as Appendix B.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on August 4, 1966. Rehearing was denied on September 20, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Question Presented

Whether it is permissible for a federal judge to impose a more severe sentence upon a criminal defendant because the defendant has exercised his constitutional right to plead not guilty and stand trial.

Constitutional Provisions

The constitutional provisions involved are the Fifth and Sixth Amendments to the United States Constitution.

Statement

Petitioner Seymour Salb seeks review of a judgment entered on January 20, 1966 in the United States District Court for the Southern District of New York[1] (Metzner, J. presiding), and affirmed on August 4, 1966 by the United

---

[1] The Unted States District Court had jurisdiction over the matter because petitioner was charged with violating federal criminal statutes, viz., Title 18, U.S. Code, sections 2, 2314, 2315, and 371. Indictment 64 Cr. 648, filed on July 13, 1964 named as defendants Caesar Bottone, John Cancelarich, Leonard Fine, Sidney Martin Fox, Seymour Salb, Nathan Sharff, and three other individuals who were not tried and who are unimportant in the context of this appeal. The indictment contained eleven counts, of which petitioner was charged with four, viz., 1, 8, 9, and 10. Counts 1 and 9 charge petitioner with violation of Title 18, U.S. Code, sections 2 and 2314. (During the course of the trial, Count 9 was dismissed as against petitioner). Count 8 charges petitioner with violation of Title 18, U.S. Code, sections 2 and 2315, and Count 10 charges him with conspiracy (Title 18, U.S. Code, section 371) to violate these sections. The present indictment superceded an earlier indictment (62 Cr. 963) filed on October 29, 1962 which contained substantially the same charges and which issued against Joseph Gerace and all those named in the 1964 indictment except petitioner (and one Maurice Rosenblatt). On December 21, 1962, defendants Cancelarich and Fine pleaded guilty to all 5 counts of the 1962 indictment and on January 11, 1963, Gerace did likewise.

Footnote 1 continues on next page

States Court of Appeals for the Second Circuit (rehearing denied September 20, 1966).

"The enterprise that was the subject of this indictment involved stealing and preserving cultures Lederle had developed, temporarily removing and copying documents that outlined manufacturing procedures, and then selling the cultures and the copies primarily for ultimate exportation to Europe." *United States* v. *Bottone, Salb, and Sharff*, —— F. 2d —— (2d Cir., decided August 4, 1966). Seymour Salb, Caesar Bottone, and Nathan Sharff "did not steal the processes or the cultures" (R. 2873); they were "on the receiving end." *United States* v. *Bottone et al.* The actual stealing was done by "two former Lederle employees, Sidney Fox and John Cancelarich, and their lieutenant Leonard Fine", who were correctly characterized by the Court of Appeals as "the chief culprits." *Ibid.* The "chief culprits" pleaded guilty to all the charges against them (5 against Cancelarich and Fine and 9 against Fox) and were given "light sentences of six months imprisonment." *Ibid.* Salb, Bottone, and Sharff pleaded not guilty, stood trial, and were found guilty (on 3, 3, and 4 charges respectively). They were each given sentences of two years imprisonment.[2]

An analysis of the facts surrounding the sentencing shows that the trial judge imposed a harsher sentence on petitioner

---

Footnote 1 continued

On November 2, 1964, defendant Fox pleaded guilty to all 9 counts with which he was charged in the present indictment, viz., Counts 1 through 7, and 10 and 11. Sentencing of these four defendants was held in abeyance pending the trial of defendants Bottone, Salb and Sharff.

[2] A motion by petitioner Salb (and Sharff) to have the defendants who pleaded guilty sentenced before the trial was denied. Joseph Gerace, a minor participant, received a suspended sentence.

Salb (two years) than on the "chief culprits" (six months) not because of any difference in culpability, remorse, or need for rehabilitation or deterrence, but solely because Salb asserted, and the "chief culprits" waived, the constitutional right to plead not guilty and stand trial.

The trial judge did not base the different sentences imposed on Salb and the "chief culprits" on any difference in "culpability." Indeed if he had considered relative culpability, Salb would have received a lower sentence than the chief culprits. The trial court found that Dr. Fox "is the manipulator of the whole thing and that he made at least $80,000." (R. 2899)[3] He found further that the chief culprits stole the processes "on their own, wilfully and knowingly". (R. 2873) "Nobody told you to do this. You did this on your own. You weren't goosed, as the saying goes, by either Salb, or Sharff or Bottone. The three of you did this, stole from your employers for gain." (R. 2897) Petitioner Salb, on the other hand, merely "knew that it was going on." (R. 2873) There can be no dispute that the trial judge correctly regarded petitioner Salb as less culpable than the chief culprits.[4]

Nor did the judge regard the chief culprits' decision to plead guilty as evidence that they were more remorseful than Salb. Indeed he specifically told them that if the plot

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[3] At another point the trial judge said that Nathan Sharff was "the head of this." (R. 2873) In the context in which it was said, "this" may have had reference to the "receiving end," rather than the entire scheme. In any event, there was no claim, nor could there be, that petitioner Salb was the "head" of any aspect of the transactions.

[4] Among the six relevant defendants, petitioner was convicted of the least number of charges (3) and the bail set for petitioner ($1,000) was less than that set for defendants Bottone or Sharff ($2,500 each).

had not been revealed by another, "I have great doubt whether any of the three of you would have opened your mouths. It is a sort of heads I win, tails you lose situation. If you are not caught you will keep the profits and if you are caught you confess immediately and expect the court not to impose a jail sentence." (R. 2897-2898)[5] Moreover, a difference in remorse would only be relevant if it reflected a step along the road to rehabilitation and away from recidivism. But the judge here, in enumerating the factors which he considered in imposing sentence on the defendants in this case, explicitly eliminated the need for rehabilitation or the fear of recidivism: "knowing that none of you are ever going to do anything of this type again." (R. 2873)

Neither did the judge base the different sentences on any difference in the need for deterrence. He did consider deterrence of others in imposing sentence. But he clearly did not regard people in Salb's situation as in need of a stronger deterrent than those in the chief culprits' situation. To the contrary, he emphasized the need for a "deterrent to other people of your same mentality, [meaning the chief culprits who held advanced degrees in chemistry] and in the same areas of trust . . ." [meaning the chief culprits who stole from their employers]. (R. 2898)

The only relevant variable between Salb and the chief culprits, therefore, and the variable on which the sentencing judge clearly relied in imposing a harsher sentence on Salb,

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[5] In an effort to show that the sentencing judge relied on differences in remorse, the Government, in its brief to the Court of Appeals, emphasized that the chief culprits had cooperated with "American Cyanamid, the victim of the thefts." But in response to a suggestion made at the sentencing hearing that such cooperation should be considered, the sentencing judge specifically said: "I am not the least bit interested in the cooperation with American Cyanamid." (R. 2883)

is that Salb asserted, and the chief culprits waived, the constitutional right to plead not guilty and stand trial.

This issue was properly raised prior to the imposition of sentence on Salb. In addressing the court, counsel said:

> "If one is to be punished for going to trial, I don't think that is quite in accordance with our present-day method of the administration of justice."[6]

It was also properly raised on appeal. Petitioner's brief devoted several pages to this issue. (See appellants' brief pp. 97-104).

This Court's Power to Review

It should be made clear at the outset what this Court is *not* being asked to do. It is not being asked to "enter the domain of penology, and more particularly that tantalizing aspect of it, the proper apportionment of punishment." *Gore* v. *United States,* 357 U.S. 386, 393 (1958). As in *Townsend* v. *Burke,* 334 U.S. 736 (1948), "it is not the duration or severity of this sentence that renders it invalid," 334 U.S. at 741; it is the fact that the trial court based its sentence upon an unconstitutional criterion—petitioner's having asserted his constitutional rights—that renders the

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[6] Counsel for defendant Sharff stated further:

> "Sharff went to trial, as he had a perfectly legal right to do. He went to trial. He had a perfect right as a citizen and as a defendant in a criminal case to put the government to its proof. Now, I appreciate the fact that there are situations where it can be said: Well, the man didn't go to trial. He pleaded guilty. He saved the government the expense of trial, whereas this man by going to trial, it may be said, cost the government the expense of a trial. That is probably true, but I think that is the cost of the administration of justice as we have it in this district and in this country today." (R. 2865-2866)

sentence constitutionally defective.[7] Since the constitutionality of the standards employed by the District Court is being challenged, the fact that the sentence was within the limits allowed by statute does not bar review.[8] If petitioner's sentence is found to be constitutionally defective it is, of course, not necessary that he be given a new trial on the question of guilt or innocence. Nor is it necessary for this Court to impose a new sentence. The case should be remanded to the District Court with instructions to resentence petitioner giving no weight to the fact that he asserted his constitutional rights.

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[7] Compare *Stack* v. *Boyle*, 342 U.S. 1 (1951), where the Court reversed a trial court's determination of bail although the setting of bail is largely a discretionary function. The Court said:

> "Petitioner's motion to reduce bail did not merely invoke the discretion of the District Court setting bail within a zone of reasonableness, but challenged the bail as violating statutory and constitutional standards." *Id.* at 6.

[8] For example, no one would seriously question the power of this Court to review a sentence that imposed increased punishment upon an individual because of his race or political beliefs, even if the increased punishment were within permissible limits. Cf. *Sims* v. *Georgia*, 384 U.S. 998 (1966) (grant of certiorari, question 5). See also *Gurera* v. *United States*, 40 F. 2d 338, 340 (8th Cir. 1930); *Skinner* v. *Oklahoma*, 316 U.S. 535, 541 (1942); *McLaughlin* v. *Florida*, 379 U.S. 184, 194 (1964). Only factors which are consonant with the Constitution may be given consideration in imposing a sentence, and it is the proper function of this Court to determine which factors are, and which are not, consonant with the Constitution.

REASONS FOR GRANTING THE WRIT

I. This Court should declare it unconstitutional to impose a harsher sentence upon a criminal defendant because he has exercised his constitutional right to plead not guilty and stand trial.

In *Griffin* v. *California*, 380 U.S. 609 (1965), this Court considered the "single question whether comment on the failure to testify violated the Self-Incrimination Clause of the Fifth Amendment . . . ." The Court held that it did because:

> "It is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly." *Id.* at 614.

The constitutional principle thus articulated—that courts are not permitted to impose a penalty on an individual for exercising his privilege against self-incrimination[9]—applies with full force to the practice of imposing a harsher sentence on a criminal defendant for exercising his constitutional right to plead not guilty and stand trial.

The right to plead not guilty and stand trial is implicit in the Fifth Amendment's privilege against self-incrimina-

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[9] More recently in *Miranda* v. *Arizona*, 384 U.S. 436 (1966), the Court, citing *Griffin*, reiterated this constitutional principle in the context of pre-trial interrogation:

> "In accord with this decision, it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege [against self-incrimination] in the face of accusation."

Id. at 468 n. 37.

See also, *Garrity* v. *New Jersey* ("Appeal from Sup. Ct. N.J. Further consideration of the question of jurisdiction postponed to the hearing of the case on the merits.") 383 U.S. 941 (1966); *Spevack* v. *Klein, cert. granted*, 383 U.S. 942 (1966).

This Court has declined to apply *Griffin* retrospectively. *Tehan* v. *United States ex rel. Shott*, 382 U.S. 406 (1966).

tion and explicit in the Sixth Amendment's "right to a speedy and public trial." It is a fundamental constitutional right which lies at the heart of our accusatorial system of criminal justice. Without it, other rights of the accused which this Court has been so vigilant to preserve would have little meaning. Thus, the constitutional privilege whose assertion has been made costly here (the right to plead not guilty and stand trial) is at least as fundamental as the constitutional privilege whose assertion had been made costly in *Griffin* (the privilege against self-incrimination).

Moreover the "penalty" at issue here imposes at least as great a cost and cuts down at least as much on the constitutional right asserted as did the "penalty" in *Griffin*. In *Griffin*, the penalty consisted of comment on the exercise of the privilege. Here, the penalty consists of a harsher sentence. Courts have long recognized that imposing an increased sentence as "the price" for exercising a right "cuts down on" that right significantly. In *Green* v. *United States*, 355 U.S. 184 (1957), the Court condemned the Government's attempt to force a convicted person to choose between not appealing his conviction and the possibility of more severe punishment if he successfully appeals and is retried.

> "The law should not, and in our judgment does not, place the defendant in such an incredible dilemma." *Green* v. *United States* at 193.[10]

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[10] The United States Court of Appeals for the Second Circuit (Marshall, J.) recently held unconstitutional a similar New York practice. See *United States ex rel. Hetenyi* v. *Wilkins*, 348 F. 2d 844, 859 (2d Cir. 1965). Compare *Stroud* v. *United States*, 251 U.S. 15 (1919); *People* v. *Henderson*, 60 Cal. 2d 472, 386 P. 2d 677, 686 (1963); *Desmond* v. *United States*, 345 F. 2d 225 (1st Cir. 1965); Harsher Penalties and the "Successful" Criminal Appellant, 74 Yale L.J. 606, 623-636 (1965).

It is an even more "incredible dilemma" to force an accused who has not been convicted of any crime to choose between pleading guilty and the possibility of receiving a more severe punishment if convicted after trial.

The Solicitor General of the United States apparently agrees that the practice of imposing a greater penalty because a defendant has exercised his constitutional right to stand trial is not permissible. In the recent case of *Jimmie Johnson* v. *United States, cert. denied,* 382 U.S. 836 (1965), *rehearing denied,* 382 U.S. 1000 (1966), petitioner alleged, for the first time in a petition for rehearing from the denial of certiorari, that the trial judge had erred in imposing sentence on him by weighing the fact that he chose to stand trial. The Court requested the Solicitor General to file a response to the petition for rehearing. 382 U.S. 923 (1965). In his response, the Solicitor General took the position that:

> "We do not for a moment suggest that it is permissible practice for a trial judge to add to a penalty because a defendant has rested upon his constitutional right to put the government to its proof." (citing *United States* v. *Wiley,* 278 F. 2d 500 (7th Cir. 1960).) (Brief of the Solicitor General in response to petition for rehearing, p. 4)[11]

The Solicitor General suggested three reasons, none of which apply here, why the record in that case did not raise this issue.[12]

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[11] Although himself taking the position that this practice is impermissible, the Solicitor General recognized that federal judges have "differing views" on this matter. (citing 1959 Pilot Institute on Sentencing) (see p. 25 *infra*).

[12] The "question was not raised in any form either in the district court or the court of appeals and . . . it was not presented in the petition for certiorari." Here, as demonstrated at p. 6, *supra,* the

Footnote 12 continues on next page

Thus there would seem to be no dispute that in a case which properly raised the issue of increased punishment for exercising the right to plead not guilty and stand trial, as this case does, the Court should grant the writ and declare that practice unconstitutional.

II. The Court should exercise its supervisory power over the administration of justice in the federal courts and proscribe the practice of imposing harsher sentences on defendants who plead not guilty.

A. The propriety of exercising the supervisory power

Even if it is felt that the court below did not violate petitioner's constitutional rights, the decision below can and should be reversed as not consonant with the "proper standards for the enforcement of the federal criminal law in the federal courts." *McNabb* v. *United States,* 318 U.S. 332, 341 (1943). The distinguishing feature of the supervisory power is that it is a method of judicial control over

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Footnote 12 continued
question was specifically raised at trial and on appeal. The judge did not weigh against Johnson "the fact that [he] went to trial," but rather "the quality of the defense" (which revealed, among other things, "an attempt to suppress information" and an episode involving an attempted bribe). In this case there was no allegation, nor could there be any, that there was anything in petitioner Salb's defense which could be considered adversely by the judge. The only proof offered by Johnson to demonstrate that he had been penalized for exercising his constitutional right to stand trial consisted of a listing of lesser offenses received by persons arrested at the same time who chose to plead guilty. The Solicitor General correctly observed that "this constitutes an insufficient showing that the sentence imposed on petitioner was unreasonable, [since none] of the persons was in any way connected with petitioner's operations." Here, on the other hand, the defendants who received lesser sentences were all intimately connected in the same operations.

the judiciary itself. See *Sherman* v. *United States*, 356 U.S. 369 (1958).[13] In *Sherman* and *McNabb*, the Court exercised authority over what were essentially police and prosecutorial practices in which the courts were simply instrumentalities. In this case the Court is being asked to exercise its power over an exclusively judicial practice.[14]

B. The practice and its effects

That the practice of imposing harsher sentences on defendants who assert their constitutional right to plead not

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[13] See also, Note, The Supervisory Power of the Federal Courts, 76 Harv. L. Rev. 1656, 1660 (1963). As Justice Frankfurter observed in *Sherman* v. *United States*, 356 U.S. 369, 380 (1958) (concurring opinion):

> "Insofar as they are used as instrumentalities in the administration of criminal justice, the federal courts have an obligation to set their face against enforcement of the law by lawless means, or means that violate rationally vindicated standards of justice, and to refuse to sustain such methods by effectuating them."

[14] Petitioner does not challenge the "plea bargaining" practice whereby the *prosecutor* reduces the charges against a defendant in exchange for a plea of guilty. Courts have long recognized the distinction between *prosecutorial* and *judicial* inducements to plead guilty. As Judge Weinfeld pointed out in *United States ex rel. Elksnis* v. *Gilligan*, 256 F. Supp. 244 (S.D.N.Y. 1966):

> "It may well be . . . that voluntary, as distinguished from coercive, bargaining between the prosecutor and the defendant has been sanctioned by propriety and practice—in some measure they deal at arm's length. But this is quite different from approbation of plea bargaining between the judge and the accused, where the disparity of position is extremely marked." *Id.* at 255.

Although Judge Weinfeld was specifically addressing himself to the situation where a judge explicitly promises a lower sentence upon a plea of guilty, his remarks apply with equal force to the widespread judicial practice of imposing lower sentences on those defendants who forego their right to trial. See *infra* pp. 15-16.

The distinction between prosecutorial and judicial plea bargaining was also recognized by Judge Marshall in his dissenting opinion in *United States ex rel. McGrath* v. *LaVallee*, 319 F. 2d 308, 319 (2d Cir. 1963):

guilty and stand trial is widespread and "generally accepted by trial judges throughout the United States"[15] is "incontestable";[16] that it is well-known to criminal defendants[17] and the criminal defense bar[18] is also beyond dispute. The United States Court of Appeals for the 8th Circuit has taken "judicial notice of the fact that trial courts quite generally impose a lighter sentence on pleas of guilty than in cases where the accused pleaded not guilty but has been found guilty by a jury." *Dewey* v. *United States*, 268 F. 2d 124, 128 (1959). Sentencing statistics for the federal courts display a definite correlation between pleas of not guilty

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[15] *United States* v. *Wiley*, 184 F. Supp. 679, 685 (N.D. Ill. 1960).

[16] 8 Moore's Federal Practice §11.05[3] (2d ed. Cipes 1966).

See also Newman, Conviction: The Determination of Guilt or Innocence Without Trial 61 (1966) where the author, after a year-long study of sentencing practices, notes that:

> "There is little doubt that, where possible, judges tend to show greater leniency in sentencing to the defendant who pleads guilty than to the defendant who demands a jury trial."

Ohlin and Remington, Sentencing Structure: Its Effect Upon Systems for the Administration of Criminal Justice, 23 Law & Contemp. Prob. 495, 502-503 (1958), have observed that

> ". . . inducements offered by the trial court to plead guilty may vary. In some systems, an offender may be told the sentence he will receive if he pleads guilty. . . . A less obvious way is the maintenance of a system where the common assumption of offenders is that a plea of guilty will result in sentencing concessions.

[17] See, *e.g.*, Newman, Pleading Guilty for Considerations: A Study of Bargain Justice, 46 J. Crim. L., C. & P. S. 780, 785-87 (1956).

[18] See *e.g.*, the statement by Judge William J. Campbell in Pilot Institute on Sentencing, 26 F.R.D. 231, 288 (1960):

> "In a large metropolitan court it would be impossible to keep abreast of the large number of criminal cases if it were not generally known among the practicing bar that consideration is given to those who are willing to plead guilty."

and increased punishment;[19] direct questioning of federal judges establishes that a large majority of them impose more severe punishment on defendants who plead not guilty;[20] and interviews with defendants who have pleaded guilty reveal that they and their lawyers were well aware of, and often acted in response to, the expectation of increased punishment in the event they were convicted upon

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[19] In 1963 the following figures were released for the federal courts:

Plea	*% Imprisoned*	*% Getting Year or More*
original plea of guilty	43.4	31.7
not guilty, changed plea to guilty	38.3	26.7
convicted by court	53.3	40.4
convicted by jury	72.2	57.6

Administrative Office of the United States Courts, Federal Offenders in the United States District Courts (1963).

These figures substantially confirm the findings of a Yale Law Journal survey of all 240 federal district judges, in which sixty-six per cent of the 140 judges who returned questionnaires indicated that they

> "consider the defendant's plea a relevant factor in local sentencing procedure. . . . The estimates of the extent to which the fine or prison term was diminished for a defendant pleading guilty varied from 10 to 95 per cent of the punishment which would ordinarily be given after trial and conviction."

66 Yale L.J. 204, 206-207 (1956).

[20] In the Yale Law Journal survey, *supra*, there were 93 affirmative and 47 negative answers to the following question:

> "When there is no mandatory sentence for the crime or the particular criminal, and the court has authority to vary the sentence, is it accepted practice to take into consideration the fact that the person to be sentenced pleaded guilty, rather than not guilty"?

Id. at 206-207 n. 17.

There were 81 affirmative responses to the next question:

> "If the answer to [the question just stated] is 'Yes,' is it accepted practice to give less severe sentences if the person pleaded guilty, rather than not guilty?" Id. at 207 n. 18.

a plea of not guilty.[21] It can hardly be denied that the practice in issue induces a great many federal defendants to forego their constitutional rights to plead not guilty and stand trial. Nor are the effects of this practice limited to guilty defendants; there is disturbing evidence to suggest that innocent defendants are sometimes induced to plead guilty by the fear of harsh penalties in the event they are erroneously convicted.[22]

Although the fact that this practice is widespread is freely admitted by judges,[23] it is rare that a sentencing judge will explicitly threaten a defendant with a harsher sentence in the event he pleads not guilty, or explicitly offer the inducement of a lighter sentence in the event he pleads guilty. One federal judge has correctly observed that there is no need for such explicitness, since the "Court's practice [of showing 'more leniency to one who confesses his crime and disposes of his case without cost or consumption of the time of

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[21] See Newman, Pleading Guilty for Considerations: A Study of Bargain Justice, 46 J. Crim. L., C. & P.S. 780, 784 (1956). See also Newman, Conviction: The Determination of Guilt or Innocence Without Trial 61 (1966).

[22] Newman, in Conviction: The Determination of Guilt or Innocence Without Trial (1966) notes that defendants have entered

> "false pleas of guilty under the expectation of judicial leniency where the circumstantial case seems strong or where the defendant is otherwise afraid to submit his fate to a jury." *Id.* at 24.

See also, Comment, 66 Yale L.J. 204, 220 (1956):

> "Confronted with the probability that conviction after trial will substantially enhance punishment, a defendant may decide that assertion of his innocence entails too much of a risk.

[23] See notes 19-20 *supra; Dewey* v. *United States,* 268 F. 2d 124, 128 (8th Cir. 1959); *United States* v. *Wiley,* 184 F. Supp. 679, 685 (N.D. Ill. 1960).

the Court'] will soon be found out without the Court making a statement of policy."[24] The absence of explicitness about this practice does not, however, significantly diminish its deleterious effects on the federal judicial system, since most defendants, especially those with previous experience, have "found out" about it and act in expectation of its rewards and punishments.[25] But it does make proof of its application in any given case extremely difficult. This situation, therefore, is a particularly appropriate one for the exercise of this Court's supervisory power. It has been recognized that the supervisory power "does not depend upon the showing of prejudice in an individual case." *Ballard* v. *United States,* 329 U.S. 187, 195 (1946). Instead the Court has "an obligation that goes beyond the conviction of the particular defendant before the court." *Sherman* v. *United States,* 356 U.S. 369, 380 (1958) (concurring opinion). This Court is not likely to be presented with a record which raises this important issue more clearly.

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[24] Pilot Institute on Sentencing, 26 F.R.D. 231, 289 (1960) (statement by Judge Randolph H. Weber).

[25] "Realistically, the guilty plea process operates effectively only if defendants come to expect, and do receive, greater leniency in sentencing on a plea of guilty than if they demand trial."

Newman, Conviction: The Determination of Guilt or Innocence Without Trial 66 (1966).

> "The way bargaining now works, the more experienced criminals can manipulate legal processes to obtain light sentences and better official records while the less experienced, occasional offenders receive more harsh treatment."

Newman, Pleading Guilty for Considerations: A Study of Bargain Justice, 46 J. Crim. L., C. & P.S. 780, 790 (1956).

C. Justification offered in defense of the general practice

It is frequently urged that defendants who plead guilty have thereby evidenced remorse,[26] contrition or a "willingness to assume responsibility" for their criminal conduct;[27] and thus, since they are well along the road to rehabilitation, a lighter sentence is warranted.[28] It has been widely recognized, however, that precisely because of the practice in issue, this argument "involves considerable circularity. The reason most defendants plead guilty is simply because they wish to take advantage of what they expect will be the judicial . . . reaction to the plea."[29] Nor does the available empirical data support the remorse-rehabilitation argument. If it were true that the plea of guilty evidences progress along the road to rehabilitation, one would expect there to be an inverse correlation between pleas of guilty and recidivism. But no such correlation

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[26] The Yale Law Journal survey, see note 19 *supra*, found that

> "The predominant basis for a court's considering a defendant pleading guilty less culpable than one denying guilt is the belief that . . . such a confession of wrongdoing evinces a repentent attitude. . . ."

Comment, 66 Yale L.J. 204, 209 (1956).

[27] Report of Advisory Committee on the Criminal Trial of the ABA Special Committee on Minimum Standards for Criminal Justice, 1966, at 47.

[28] One federal judge described his practice as follows:

> "I put the person who pleads guilty in one category and the person who pleads not guilty in another category, because the person who pleads guilty realizes that he has done something wrong and is willing publicly to confess his crime."

Pilot Institute on Sentencing, 26 F.R.D. 231, 287 (1960) (comment by Judge John W. Delehant).

[29] 8 Moore's Federal Practice § 11.05[3] n. 19 (2d ed. Cipes 1966). See also Comment, 66 Yale L.J. 204, 210-211 (1956).

has been cited. To the contrary, there is much evidence to suggest that it is precisely the recidivist—the experienced offender who has "found out" about the practice—who is most likely to plead guilty.[30] Moreover, if it were true that the reason judges impose lighter sentences on defendants who plead guilty is because they regard the plea as evidence of remorse, one would expect to find that those defendants who immediately plead guilty would receive lower sentences than those defendants who initially plead not guilty and then—presumably after some negotiation—change their plea to guilty. But again, the data point the other way. Federal sentencing statistics seem to indicate that those defendants who negotiate before they plead guilty do significantly better than those defendants who immediately plead guilty (even though the latter would seem, as a group, to be more "remorseful" than the former).[31]

Another frequently articulated justification is that those who plead not guilty must be more severely punished because of the administrative need for a large proportion

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[30] See Newman, Pleading Guilty for Considerations: A Study of Bargain Justice, 46 J. Crim. L., C. & P. S. 780, 782 (1956). See also Comment, 66 Yale L.J. 204, 211 (1956):

> "Moreover, while recidivists, poor prospects for reformation, will not be deterred from admitting guilt by the fear of impeaching their communal reputations, first offenders, though truly repentent, may well deny guilt in a desperate effort to avoid the stigma of conviction."

[31] See statistics cited *supra*, note 19.

As one source observed:

> "The differences between defendants who plead guilty originally and those who change to a plea of guilty are the reverse of what a contrition theory would lead one to expect."

Comment, 32 U. Chi. L. Rev. 167, 184 n. 62 (1964).

of guilty pleas.[32] Judge Lummus put this argument starkly when he observed that a "criminal court can operate only by inducing the great mass of actually guilty defendants to plead guilty, paying in leniency the price for the pleas."[33] The incompatibility of this justification with the "remorse" justification is obvious. The "remorse" justification rests on the assumption that guilty pleas generally reflect real remorse and that the proportion of such pleas would not be significantly reduced if the policy of rewarding them with leniency were discontinued. The "administrative need" justification, on the other hand, rests on the contrary assumption that guilty pleas do not reflect real remorse, and that unless a *quid pro quo* is offered as an inducement to a plea of guilty—or conversely, unless a punishment is threatened as a deterrent to a plea of not guilty—more defendants will choose to exercise their constitutional right to plead not guilty and stand trial. Thus the "administrative need" argument is no more than a sophisticated way of claiming that our society cannot live with the constitutional right to plead not guilty and stand trial, unless a significant number of defendants are deterred from asserting this right by the fear of harsher sentences.[34] This then

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[32] See Ohlin and Remington, Sentencing Structure: Its Effect Upon Systems for the Administration of Criminal Justice, 23 Law & Contemp. Prob. 495, 504 (1958):

[33] Lummus, The Trial Judge 46 (1937).

[34] As Judge John W. Delehant candidly put it:

> "I do not think you need to say that, because one exercises constitutional rights, he is entitled to do that without any reservation whatever."

Pilot Institute on Sentencing, 26 F.R.D. 231, 287 (1960). *Griffin* v. *California*, 380 U.S. 609 (1965) would seem clearly to say that a defendant is entitled to do just that—to exercise constitutional rights "without any reservation whatever."

is another attempt to cut "down on the privilege [to plead not guilty and stand trial] by making its assertion costly." *Griffin* v. *California* at 614. This "administrative need" argument—in various forms—has been uniformly rejected by the Court,[35] and should be rejected here as well.

D. Justifications offered in defense of the practice in this case

As previously demonstrated, the difference in sentences here cannot possibly be explained on the basis of differences in remorse, culpability, or the need for deterrence, see pp. 3-5 *supra*. Nor can the difference in sentences be justified as merely a reflection of the "reward" earned by the "chief culprits" for pleading guilty rather than a punishment imposed on petitioner for pleading not guilty. In rejecting this argument, the Yale Law Journal correctly observed that "the distinction [between penalizing defendants who plead not guilty and rewarding defendants who plead guilty] is illusory; the fact is that, whether by the means of forfeiting a reward or incurring a penalty, a demand for trial will result in a more severe sentence than would be imposed following a guilty plea."[36] A judge may not cut down on the exercise of a constitutional right "by making its assertion costly." *Griffin* v. *California*, 380 U.S. 609, 614 (1965). It matters not whether its exercise is made costly by withholding a reward rather than by imposing a penalty. The point is that it is improper for judges to encourage defendants—whether by the stick or the carrot—to waive their constitutional rights.

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[35] See, *e.g.*, *Escobedo* v. *Illinois*, 378 U.S. 478 (1964); *Miranda* v. *Arizona*, 384 U.S. 436 (1966).

[36] Comment, 66 Yale L.J. 204, 220 (1956).

The fourfold difference in sentences cannot be justified as a reflection of the reward earned by the chief culprits for "cooperating" with the government. In order to "cooperate"—and thus to earn the reward—the defendant must, of course, waive his constitutional right to plead not guilty and stand trial. A defendant who exercises his right—who insists on his innocence—cannot cooperate. Rewarding cooperation thus has the effect of imposing an impermissible cost on the decision to plead not guilty.

Moreover, it is not clear what is meant by "cooperation" in the context of this argument. If by "cooperation," it is meant that the defendants *testified* against others, it is not at all clear that they did any more than they could legally be compelled to do. For once a defendant has pleaded guilty, he cannot assert his privilege against self-incrimination when called to testify against another defendant.[37] Hence any reward he is receiving is not a reflection of the compelled act of testifying; it is a reflection

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[37] *United States* v. *Gernie*, 252 F.2d 664 (2d Cir. 1958); *United States* v. *Romero*, 249 F.2d 371 (2d Cir. 1957); *United States* v. *Cioffi*, 242 F.2d 473 (2d Cir. 1957); *Knox* v. *State*, 234 Md. 203, 198 A.2d 285 (1964); Cf. *Namet* v. *United States*, 373 U.S. 179, 188 (1963); *Reina* v. *United States*, 364 U.S. 507 (1960). There is some authority for the proposition that a person who pleads guilty can claim the privilege until he is sentenced. See, *e.g.*, *Mills* v. *United States*, 281 F.2d 736, 741 (4th Cir. 1960); *Evans* v. *State of Ohio*, 1 Ohio Decisions 436 (District Court 1852). But see, *e.g.*, *Knox* v. *State*, *supra*. Cf. *Commonwealth* v. *Tracey*, 137 Pa. Super. 221, 8 A.2d 622 (1939). It does not matter to our argument whether or not a defendant who has pleaded guilty but has not been sentenced retains his privilege against self-incrimination until after sentencing. If he does not, then surely the reward cannot be for testimony which he is compelled to give; if he does, then he is being offered an impermissible reward to relinquish a constitutional privilege. In any event, a defendant can always be sentenced before he is called as a witness, thereby eliminating any possible self-incrimination issue.

of the prior act—pleading guilty—which empowered the government to compel the testimony. If by "cooperation," it is meant that the defendant did more than merely testify —that he testified "for" the government—then the dangers of rewarding such cooperation are even greater. All witnesses are of course under a duty to tell "the truth, the whole truth, and nothing but the truth"; and honest witnesses can be counted on to do just that without the promise of reward. It is, of course, true that some dishonest defendants who plead guilty may hold back some of the truth unless offered an inducement to reveal it. But against this danger must be weighed the much greater danger that a dishonest defendant, who will tell the "whole truth" only if he is promised a reward, may "over-cooperate."[38] If by "cooperation," it is meant that the defendants made it a bit more convenient for the government by making themselves available to speak to government agents at convenient times and places,[39] then surely this is a *de minimis* consideration which does not explain—and surely cannot justify—the 400% difference in sentences reflected in this case. Nor

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[38] Courts have long recognized and expressed concern over this danger. As the Illinois Supreme Court has observed:

> "It is . . . universally recognized that such testimony has inherent weaknesses, being testimony of a confessed criminal and fraught with dangers of motives such as malice toward the accused, fear, threats, promises or hopes of leniency, or benefits from the prosecution which must always be taken into consideration. . . ." *People* v. *Hermens*, 5 Ill. 2d 277, 285, 125 N.E. 2d 500, 504 (1955).

See also *Crawford* v. *United States*, 212 U.S. 183, 204 (1909); *Outlaw* v. *United States*, 81 F. 2d 805 (5th Cir. 1936), *cert. denied*, 298 U.S. 665 (1936); *Delvalley* v. *United States*, 88 F. 2d 579 (7th Cir. 1937); *Hanks* v. *United States*, 97 F. 2d 309 (4th Cir. 1938).

[39] See statements of Assistant United States Attorney to the sentencing judge, at R. 2876-2876a, 2882.

can slight increases in convenience begin to offset the evils described in the preceding paragraphs.

Since the practice at issue has such deleterious effects on so many federal defendants as well as on the federal judicial system,[40] this Court should exercise its supervisory power in this case and prohibit the practice.[41]

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[40] The practice in issue has created serious problems for correctional authorities as well:

> "[T]he fact that opportunities and techniques for bargaining exist in our system can have an adverse effect on attempts to rehabilitate offenders and generally to decrease crime rates. What happens, for example, when one man, merely because he is unsophisticated, does not know of bargaining techniques nor of the right lawyer to contact, is sentenced to prison while another more experienced offender, a recidivist who commits the same offense, arranges a sentence to be served on probation?"

Newman, Pleading Guilty for Considerations: A Study of Bargain Justice, 46 J. Crim. L., C. & P. S. 780, 790 (1956).

It has been widely recognized that the practice in question distorts the legitimate aims of sentencing; see, *e.g.*, Ohlin and Remington, Sentencing Structure: Its Effect upon Systems for the Administration of Criminal Justice, 23 Law & Contemp. Prob. 495, 499-500 (1958); Comment, 66 Yale L.J. 204, 219 n. 77 (1956).

[41] Even if the Court has some doubt—and we think there is none—that petitioner was punished for pleading not guilty and standing trial, it would be appropriate, in light of the situation described above, to grant the petition, declare the practice in issue impermissible under the supervisory power, and remand to the sentencing court with instructions to impose a sentence that does not take defendant's plea of not guilty into consideration. If the sentencing judge decides that the present sentence did not take that factor into account, he would be free to reimpose the same sentence. See pp. 15-16 *supra*.

III. There is a direct conflict between this case and *United States* v. *Wiley*, 278 F. 2d 500 (7th Cir. 1960); 267 F. 2d 453 (7th Cir. 1959); 184 F. Supp. 679 (N.D. Ill. 1960).

In *Wiley*, as here, there were a number of defendants of varying degrees of culpability. In *Wiley*, as here, the more culpable defendants pleaded guilty and received lighter sentences than the less culpable defendant who pleaded not guilty and stood trial.[42] In *Wiley*, as here, the trial judge did not say he was punishing the defendant who stood trial for exercising his constitutional rights;[43] the trial judge there asserted that he was merely withholding from the defendant who stood trial the "leniency" which he showed those defendants who gave "their full cooperation" to the government. 184 F. Supp. 679, 685, 687. In *Wiley*, however, unlike here, the Court of Appeals for the Seventh Circuit "reject[ed] the theory that a person may be punished because in good faith he defends himself when charged with a crime"; the court there "set aside" the sentence, remanding the case to the district court "for a proper sentence not inconsistent with the views herein expressed." 278 F. 2d at 504. In this case, the identical argument was explicitly presented to the Court of Appeals for the Second Circuit (citing *United States* v. *Wiley*). In rejecting this argument (without discussion) the Second Circuit placed itself squarely in a conflict with the Seventh Circuit which requires resolution by this Court.

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[42] In *Wiley* one of the defendants who pleaded guilty and received a lighter sentence was characterized as the "ringleader", 278 F. 2d at 502; here the defendants who pleaded guilty were characterized as the "chief culprits".

[43] *United States* v. *Wiley*, 184 F. Supp. 679, 685 (N.D. Ill. 1960).

In addition to this square decisional conflict between two important Courts of Appeals, there is also a widespread conflict among federal sentencing judges as to the propriety of the practice of imposing more severe sentences on defendants who stand trial. A recent survey of 140 federal district judges disclosed, for example, that 93 did consider the defendant's plea in imposing sentence, while 47 did not.[44] Judicial discussions at Sentencing Institutes confirm this conflict.[45] Since an important conflict over the propriety of sentencing criteria exists at the point in the process where these criteria are applied,[46] and since this important con-

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[44] Comment, 66 Yale L.J. 204, 206-207 n. 17, 222 n. 94 (1956); see note 20 *supra*.

One consequence of these differing judicial views is the unequal treatment that individual defendants receive depending on whether the particular sentencing judge regards the practice as permissible.

[45] Pilot Institute on Sentencing, 26 F.R.D. 231, 285-289 (1960).

[46] It is, of course, possible that even if the Court prohibits the practice in question some judges may continue to follow it *sub silentio*. Our judicial system rests, however, on the proposition that judges will obey the law, and we must assume that if this Court explicitly prohibits the practice, the vast majority of federal judges will stop engaging in it. The significant fact is that this Court has never explicitly passed on the propriety of this widespread and deleterious practice. In *Marder* v. *Massachusetts*, 377 U.S. 407 (1964), appellant asked the Court to consider the constitutionality of a state legislative scheme which authorized a $3 fine for illegal parking if the defendant disposed of his case on "an administrative basis," and a fine of $25 if he insisted on "judicial determination of his guilt." The highest state court had justified this "simple and convenient procedure for the disposition," of "trivial" violations, as a method of freeing violators "from inconvenience disportionate to the gravity of their offense." *Commonwealth* v. *Marder*, 346 Mass. 408, 409-411, 193 N.E. 2d 695, 696 (1963). Moreover, appellant had failed properly to raise the federal question in the state courts. (Brief for appellee on Motion to Dismiss pp. 2-5). Thus, the Court's dismissal of the appeal without opinion (three Justices dissenting) cannot be said to constitute a holding that it is permissible to impose a harsher penalty on a defendant in a serious federal case because he has exercised his right to plead not guilty and stand trial.

flict is unlikely to be resolved at the circuit court level,[47] this Court should grant certiorari and decide whether it is proper for a federal sentencing judge to impose a harsher sentence on a defendant because he has exercised his constitutional right to plead not guilty and stand trial.[48]

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[47] As previously noted, this issue is rarely presented squarely to an appellate court, since sentencing judges do not often articulate the reasons behind their sentencing decisions. See pp. 15-16 *supra*.

[48] The Government, in a footnote to its brief in the Court of Appeals (p. 100 n. *) noted that defendant did not make a motion for resentencing under Rule 35 of the Federal Rules of Criminal Procedure. The Government gave no arguments as to why the defendant should have made such a motion, but in order to lay at rest any doubts that may arise on the matter, we will indicate why a Rule 35 motion was not, and indeed could not have been, taken.

The sentencing judge, in response to a request to reconsider its sentence, specifically indicated that "the court has had a tortured time for the last two weeks with this case, *and the court will not reconsider its determination*". (R. 2900) In light of this unequivocal declaration, it would have been pointless to go through the motions of asking for resentencing through a formal motion. Rule 35 was meant to expedite the administration of justice, not to encourage "wasteful circuity." Compare *Heflin* v. *United States*, 358 U.S. 415, 418 n. 7 (1959). Moreover, a motion under Rule 35 would not have been proper since an appeal was pending. As stated by 8 Moore's Federal Practice §35.02[1] (2d ed. Cipes 1966):

> "Rule 35 encompasses two forms of relief—reduction of sentence and correction of an illegal sentence. Both forms . . . (3) *prohibit it from acting during the pending of an appeal.*"

In this case, defendant appealed to the Circuit Court and has continued his appeal by seeking a writ of certiorari.

The rule does permit the correcting of an illegal sentence "at any time," and this could possibly be read to include a time when an appeal or a request for certiorari is pending. But as stated by one court with respect to the similar language in 28 U.S.C. §2255 that "A motion for such relief may be made at any time":

> "[B]oth reason and policy would seem to dictate an implied condition that where, as here, the judgment sought to be set aside is under review in an appellate court, such a motion may not be entertained by the trial court in the absence of direction from the appellate court in which the appeal is pending."

United States v. *Kobey et al.*, 109 F.Supp. 687, 688 (S.D. Cal. 1953).

CONCLUSION

For the foregoing reasons, this petition for a Writ of Certiorari should be granted.[49]

Respectfully submitted,

MOSES POLAKOFF
Counsel for Petitioner
475 Fifth Avenue
New York City, New York

ALAN M. DERSHOWITZ
GRACE POLK STERN*
Of Counsel
Langdell Hall
Cambridge, Massachusetts 02138

October 18, 1966

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[49] On October 18, 1966, a petition for a writ of certiorari was filed on behalf of co-defendant Nathan Sharff. His petition raises the following questions:

1. Did the Court below err in ruling that the evidence was legally sufficient to establish that the cultures and documents here involved were of the value of $5,000. or more within the meaning of 18 U.S.C. Sec. 2314?

2. Did the Court below err in ruling that the transportation of papers describing the Lederle processes constituted the transportation in interstate or foreign commerce of "goods" which had been "stolen, converted or taken by fraud" within the meaning of 18 U.S.C. Sec. 2314?

3. Where co-defendants pleaded guilty and their sentencing was deliberately delayed at the behest of the government for three years and until after they had testified against petitioner, was petitioner deprived of a fair trial under the Fifth Amendment to the Constitution?

If Sharff's petition is granted, we request the Court to grant Salb's petition as well, since the record in Salb's case raises these questions as well. Indeed, in one significant respect, the record for reversal is stronger as to Salb than Sharff. In affirming the conviction, the Court of Appeals accepted the Government's alternative argument that even if the papers did not constitute "goods", (see question 2 above) "count 9 charged only transportation of a stolen CTC culture which the jury necessarily found worth the statutory minimum in convicting *Sharff* and *Bottone* and in view of the concurrent sentences we need go no further as to them." (A-9, emphasis supplied). But count 9 was *dropped* as to petitioner Salb; thus the Government's alternative argument has no application whatever to Salb.

* Research for this petition was also done by Robert Winter and Jack Litman, third-year students at the Harvard Law School.

APPENDIX A

Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 436—September Term, 1965.

(Argued June 23, 1966 Decided August 4, 1966.)

Docket No. 30343

UNITED STATES OF AMERICA,

Appellee,

—v.—

CAESAR BOTTONE, SEYMOUR SALB, and NATHAN SHARFF,

Appellants.

Before:

MOORE, FRIENDLY and FEINBERG,

Circuit Judges.

Appeals from a judgment of the District Court for the Southern District of New York, Charles M. Metzner, *Judge*, convicting defendants, after a verdict, of interstate and foreign transportation of cultures and documents stolen, converted or taken by fraud in violation of 18 U. S. C. §2314, and of conspiring to do so in violation of 18 U. S. C. §371. Affirmed.

MOSES POLAKOFF, New York, N. Y. (Van Riper & Belmont, Newark, N. J.; Walter D. Van Riper, of Counsel; Theodore M. Wolkof, New York, N. Y., on brief), *for Defendants-Appellants Salb and Sharff.*

ALFRED DONATI, JR. (Zoloto, Karger & Zurkow, New York, N. Y.; Arthur Karger, of Counsel), *for Defendant-Appellant Bottone.*

DANIEL R. MURDOCK (Robert M. Morgenthau, United States Attorney for the Southern District of New York; John S. Martin, Jr., Stephen F. Williams, John E. Sprizzo, Assistant United States Attorneys), *for the United States of America.*

FRIENDLY, *Circuit Judge*:

The convictions here under appeal stem from a scheme for the massive extraction from Lederle Laboratories, a division of American Cyanamid Company located in Pearl River, N. Y., of microorganisms used in the production of three antibiotics and a steroid,[1] and instructions for the drugs' manufacture. Although the drugs were covered by patents and specimen cultures were required to be deposited in collections available for purchase by the public at minimal cost, improved strains of the microorganisms and detailed manufacturing processes developed by Lederle which

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[1] The antibiotics were tetracycline (TC), sold as Achromycin; chlortetracycline (CTC), sold as Aureomycin; and demethylchlortetracycline (DMCTC), sold as Declomycin. The steroid was triamcinolone, sold as Aristocort.

were not in the public domain offered vastly greater output from the same physical plant. The combination of this with the lack of patent protection in certain foreign countries created a market for stolen cultures and secret processes and furnished a substantial incentive for theft to disloyal employees and persons willing to do business with them. The enterprise that was the subject of this indictment involved stealing and preserving cultures Lederle had developed, temporarily removing and copying documents that outlined manufacturing procedures, and then selling the cultures and the copies primarily for ultimate exportation to Europe. As in so many criminal trials, the Government's case was presented mainly through the chief culprits, two former Lederle employees, Sidney Fox and John Cancelarich, and their lieutenant, Leonard Fine, all of whom pleaded guilty to the charges against them and were rewarded for their cooperation with light sentences of six months' imprisonment.[2] The serious crimes charged against the appellants, Salb, Sharff and Bottone, were on the receiving end.

The trial was in the District Court for the Southern District of New York before Judge Metzner and a jury. The counts submitted, on which appellants were found guilty and given two-year concurrent sentences, were in summary as follows:

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[2] Joseph Gerace, a lesser accomplice, who also testified for the Government, received a suspended sentence.

Number	*Charge*	*Appellants*
1	Transporting CTC cultures and related documents from Spring Valley, N. Y., to East Paterson, N. J., on November 11, 1959.	Salb Sharff
8	Transporting TC, CTC, DMCTC and triamcinolone cultures and related documents from New York to Rome, Italy, on April 16, 1961.	Bottone Salb Sharff
9	Transporting CTC culture from New York to Milan, Italy, on September 15, 1961.	Bottone Sharff
10	Conspiracy to steal, transport and sell cultures and related documents from March 1958 to July 1964.	Bottone Salb Sharff

Appellants' prolix briefs reargue the evidence in a manner that would scarcely be convincing to a jury and is wholly misplaced before an appellate court. Counsel ought to understand the futility of tedious efforts to show that each piece of testimony is suspectible of an innocent interpretation if it stood alone. The trier is entitled, in fact bound, to consider the evidence as a whole; and, in law as in life, the effect of this generally is much greater than of the sum of the parts. Cf. *United States* v. *Monica*, 295 F. 2d 400, 401-02 (2 Cir. 1961), cert. denied, 368 U. S. 953 (1962). Indeed we find simply frivolous the attempt to

demonstrate insufficiency by Salb and Sharff, who, as proprietors of Biorganic Laboratories of East Paterson, N. J., had begun illicit dealings with Fox in stolen Lederle cultures as early as the winter of 1958, continued their purchases of microorganisms and documents for more than two years; and then switched their custom to Cancelarich after he had acquired most of Fox' collection of Lederle cultures and records. Although Bottone entered the conspiracy at a later stage and the Government adduced no direct testimony that he had heard the cultures and documents described as stolen from Lederle, the evidence of his participation in discussions as to disposition of the goods and of his substantial role in facilitating transportation abroad of both cultures and participants, which we summarize in the margin,[3] amply met the Government's burden. To

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[3] Bottone's first significant appearance was in June 1960 when Sharff and Salb were endeavoring to persuade Fox it would be dangerous for him to sell the stolen materials by himself. They placed a fake advertisement seeking information in a trade paper under the name of a Dr. Angelo Mancuso, with the address of Sharff's brother-in-law. Fox answered the ad and met in London with a business associate of Bottone, Salvetti, who masqueraded as Dr. Mancuso. Salvetti telephoned Bottone who was then in Italy and, saying he had just met with a group that had closed a big deal which he had to stop, asked Bottone to cable him in London that Interpol was investigating the theft of Lederle trade secrets. Bottone sent the cable, left for London in the middle of the night, and secretly observed Salvetti show the cable to Fox. Afterwards Salvetti told Bottone he wanted to stop Fox' deal so that he might offer the same information and microorganisms at a lower price. In March 1961 Bottone had a visit in Berlin with Wawretschek, head of a Milan pharmaceutical firm, Ankermann, which had been a purchaser of the stolen cultures and processes; Wawretschek complained about the quality of the microorgansims and suggested a new deal whereby Salb, Sharff, Salvetti and Bottone would buy into his company. Bottone telephoned this proposal to Salvetti in Rome; on April 10 the American group executed a purchase contract in New Jersey, with Salvetti signing in Bottone's behalf. On April 14 Fine and Salvetti drove Cancelarich from Salvetti's apartment in Bronxville, N. Y., to Biorganic to discuss Cancelarich's employment at Ankermann with Salb, Sharff and Bot-

hold that the jury could not be convinced from all this evidence of his comings and goings that Bottone knew what was about, would require a greater degree of credulity than even such "naif, simple-minded men" as appellate judges, see Holmes, Collected Legal Papers 295 (1920), can be expected to possess. And we are wholly unimpressed by the criticisms now made of the judge's summary of this evidence, to which counsel took no exception at the time. See *United States* v. *Kahaner*, 317 F. 2d 459, 478-79, 482 (2 Cir.), cert. denied, 375 U. S. 836 (1963).

The only serious point of law raised by appellants is whether the transportation of papers describing the Lederle processes constituted the transportation in interstate or foreign commerce of "any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converetd or taken by fraud."

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tone. Cancelarich made a full revelation of his own thieveries and his possession of Fox' collection of Lederle cultures and processes, but it was not proved that this was heard by Bottone, who arrived late. Two days later Bottone drove Cancelarich from Fort Lee, N. J., to Kennedy Airport and bought him a ticket to Italy; Cancelarich carried stolen cultures and papers describing Lederle's processes. Bottone subsequently flew to Milan and in May introduced Cancelarich to a Dr. Marpurgo, representing a Milan firm called MIBA, who was interested in buying a DMCTC process. Cancelarich promised to furnish this for $60,000, which he agreed to split with Bottone who said he would split his share with Salvetti. The culture and processes furnished MIBA were stolen from Lederle. Somewhat later Bottone drove Fine, equipped with stolen Lederle cultures and documents destined for Ankermann, from New Jersey to Kennedy Airport and bought him a ticket to Italy. Fine and Marpurgo subsequently reported to Bottone's MIBA's success with the processes supplied by Cancelarich. In July Bottone financed a trip to Italy for Fine whom he asked to collect $2,000 of his share from Marpurgo. Finally, in September 1961 Bottone, at Sharff's request, took a CTC culture from New York to Milan for delivery to Wawretschek, telling him that the package contained strains coming from Fine.

18 U. S. C. §2314. The problem is not any doubt on our part that papers describing manufacturing procedures are goods, wares, or merchandise, as was held with respect to geophysical maps in *United States* v. *Seagraves*, 265 F. 2d 876 (3 Cir. 1959), and *United States* v. *Lester*, 282 F. 2d 750 (3 Cir. 1960), cert. denied, 364 U. S. 957 (1961). Neither do we have any concern over the value of these papers, since we dismiss out of hand the contentions that secret processes for which European drug manufacturers were willing to pay five and six figures and in whose illicit exploitation appellants eagerly invested a large portion of their time and an appreciable amount of their fortunes were not worth the $5,000 required to subject them to federal prosecution, see *United States* v. *Schaffer*, 266 F. 2d 435, 440 (2 Cir. 1959), aff'd, 362 U. S. 511 (1960), or that the judge committed any prejudicial error in his submission of that issue to the jury. If *Abbott* v. *United States*, 239 F. 2d 310, 312-13 (5 Cir. 1956) is to be considered as ruling out evidence of value in a thieves' market, we prefer the contrary Third Circuit holdings in *United States* v. *Seagraves, supra*, 265 F. 2d at 880, and *United States* v. *Lester, supra*, 282 F. 2d at 754-55. The serious question is whether, on the facts of this case, the papers showing Lederle processes that were transported in interstate or foreign commerce were "goods" which had been "stolen, converted or taken by fraud" in view of the lack of proof that any of the physical materials so transported came from Lederle's possession. The standard procedure was for Fox and Cancelarich to remove documents from Lederle's files at Pearl River, N. Y., take these to Fox' home within New York state, make photocopies, microfilms or

notes, and then restore the purloined papers to the files; only the copies and notes moved or were intended to move in interstate or foreign commerce. The case differs in this respect from the Third Circuit cases of *Seagraves* and *Lester* where, as the records on appeal show, the photostats and tracings delivered by the Gulf Oil geologist were the property of the company, having been made in the company's office, on its paper and with its equipment.

We are not persuaded, however, that a different result should obtain simply because the intangible information that was the purpose of the theft was transformed and embodied in a different physical object. To be sure, where no tangible objects were ever taken or transported, a court would be hard pressed to conclude that "goods" had been stolen and transported within the meaning of §2314; the statute would presumably not extend to the case where a carefully guarded secret formula was memorized, carried away in the recesses of a thievish mind and placed in writing only after a boundary had been crossed. The situation, however, is quite different where tangible goods are stolen and transported and the only obstacle to condemnation is a clever intermediate transcription or use of a photocopy machine. In such a case, when the physical form of the stolen goods is secondary in every respect to the matter recorded in them, the transformation of the information in the stolen papers into a tangible object never possessed by the original owner should be deemed immaterial. It would offend common sense to hold that these defendants fall outside the statute simply because, in efforts to avoid detection, their confederates were at pains to restore the

original papers to Lederle's files and transport only copies or notes, although an oversight would have brought them within it. We have been instructed to "free our minds from the notion that criminal statutes must be construed by some artificial and conventional rule," *United States* v. *Dege*, 364 U. S. 51, 52 (1960) (Frankfurter, *J.*), quoting *United States* v. *Union Supply Co.*, 215 U. S. 50, 55 (1909) (Holmes, *J.*). See also *United States* v. *Sullivan*, 332 U. S. 689, 693-94 (1948); *United States* v. *Bramblett*, 348 U. S. 503, 509-10 (1955); *United States* v. *Turley*, 352 U. S. 407, 412-13 (1957). Such considerations have particular force when, as here, the defendants could not have doubted the criminal nature of their conduct, and the sole issue is whether they subjected themselves to punishment by the United States as well as by a state.

Alternatively, we accept the Government's suggestion that the judgment may stand even if the statute does not reach far enough to include the copies and notes. Each count included and the evidence showed the transportation of cultures which were stolen "goods" on any view. The problem whether the copies and notes of Lederle documents were also within the statute arises only because substantive counts 1 and 8 and conspiracy count 10 charged the transportation both of cultures and of documents and the jury made no finding that the cultures alone were worth $5,000, although it would have been quite justified in doing so. But, says the Government, count 9 charged only transportation of a stolen CTC culture which the jury necessarily found worth the statutory minimum in convicting Sharff and Bottone and in view of the concurrent sentences we need not go further as to them. And Salb's conviction

should also stand since the transportation of the culture charged in count 9 was in furtherance of the conspiracy alleged in count 10 and the journey was one of the overt acts. In accepting this argument here we would not wish to be understood as giving all-out obeisance to the validation of concurrent sentences by the presence of one or more good counts, see *Lawn* v. *United States,* 355 U. S. 339, 359-62 (1958); despite frequent reliance on this principle where appropriate, we adhere to Judge Clark's statement that we will reverse for a material error on another count "whenever the nature of the error committed below or other circumstances suggest that the accused might have received a longer sentence than otherwise would have been imposed, or that he has been prejudiced by the results of the proceedings." *United States* v. *Hines,* 256 F. 2d 561, 563 (2 Cir. 1958); cf. *United States* v. *Barash,* —— F. 2d ——, —— (2 Cir. 1966). But this is not such a case. The error —if there was one—went only to including the papers in the determination of value under counts 1, 8 and, by reference, the conspiracy count, and, as said in *United States* v. *Schaffer, supra,* 266 F. 2d at 440:

> "The only reason for the $5,000 limitation is to avoid overtaxing the Department of Justice. There is no legitimate interest of [defendants] . . . which the Congress sought to protect by this requirement."

We have not the slightest question that the jury would have properly convicted on all counts if only the transportation of cultures had been charged, and the papers had been relied on simply as demonstrating the scope of the criminal enterprise and as enhancing the value of the microorgan-

isms. Judge Metzner's remarks on imposing sentence show that he viewed defendants' activities as a whole, and the two-year concurrent sentences were modest as compared to the permitted maximum of ten years imprisonment, a $10,000 fine, or both, on each substantive count, 18 U. S. C. §2[illegible]4, or the five years imprisonment, $10,000 fine or both, on the conspiracy count, 18 U. S. C. §371.

The only other point meriting discussion, and that somewhat questionably, is Bottone's objection to the Government's being allowed to use a deposition and a memorandum of further interrogatoin in a civil action. Merck & Co. had obtained a consent judgment of $100,000 in the District Court for New Jersey against Bottone for infringement of its patent on Vitamin B-12. In May 1962 it entered into an agreement, amended a month later, whereby it would accept $15,000 in satisfaction of the judgment if Bottone would give a "frank and complete disclosure in depositions under oath of all matters and things" within his knowledge on a specified list of subjects. Bottone claims that government investigation had "focused" upon him before the bulk of the interrogation, see *Escobedo* v. *Illinois*, 378 U. S. 478, 490 (1964), that his answers were extracted by pressure and subterfuge on the part of Merck's New Jersey attorney who also represented American Cyanamid in that state, and that much of the interrogation was conducted without Bottone's counsel being present. Therefore, he insists, use of his answers at trial should have been barred as in violation of Fifth and Sixth Amendment rights, or that at least he should have been given a hearing to prove that Merck's lawyer was acting in part at the Government's behest.

Putting to one side the Government's substantial claims that these points were not sufficiently raised below, we find them wholly without merit. In no conceivable way was Bottone "compelled . . . to be a witness against himself." He freely consented to the interrogation, for his own benefit, to rid himself of a liability for $85,000; if the questioning touched on matters tending to incriminate him, he was free to claim the privilege on penalty only of foregoing the financial advantages that performing his agreement to talk would entail. Since he was not in custody, the rules laid down in *Miranda* v. *Arizona*, —— U. S. —— (1966), have no application even if Merck's attorney were working with the Government—quite apart from this having been a pre-*Miranda* trial. See *Johnson* v. *New Jersey*, —— U. S. —— (1966). In any event, not only is it fairly inferable that Bottone had the advice of counsel when he signed the agreement with Merck but a lawyer was present during half the civil interrogation and there was nothing to prevent one from assisting throughout if Bottone had wished. Moreover, in contrast to *Massiah* v. *United States*, 377 U. S. 201 (1964), no "criminal prosecution" against Bottone had been commenced at the time of the questioning, and *Miranda* appears to teach that the references in *Escobedo* v. *Illinois*, *supra*, to the need for counsel in the period prior to initiation of the criminal process were solely concerned with the need for a lawyer to counteract the coercion thought to be inherent in in-custody interrogation.

Affirmed.

APPENDIX B

Minutes of Sentence

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

64 Cr. 648
64 Cr. 963

UNITED STATES OF AMERICA

vs.

CAESAR BOTTONE, et al

Before:

HON. CHARLES M. METZNER,
District Judge.

New York, January 20, 1966

STENOGRAPHER'S MINUTES

(2913)

Present:

Mr. Martin,
Mr. Murdock,
Mr. Novok,
Mr. Polakoff,
Mr. Van Riper,
Mr. Chapman,
Mr. Howell,
Mr. Bauman,
Mr. Brown.

Mr. Polakoff: We have the matter of the motions open, your Honor.

The Court: You may make your motions now.

Mr. Polakoff: Your Honor, I move to set aside the verdict and for a new trial on all the grounds stated by the defendants at the end of the government's case, and at the end of the entire case as if they were fully set forth now again.

The Court: Motion denied.

Mr. Van Riper: With regard to the defendant Sharff, I ask to be associated with the motion that Mr. Polakoff has just made.

The Court: The motion is denied.

(2914) Mr. Novok: On behalf of the defendant Bottone, I ask to be associated in the motions made by my colleagues in behalf of their respective clients and I respectfully repeat all motions heretofore made at the end of the government's case and at the end of the entire case, and I now respectfully move that the verdict of the jury be set aside and a new trial be ordered or, in the alternative, that a judgment of acquittal be entered by the Court.

The Court: All the motions you just made, Mr. Novok, I deny.

Mr. Novok: Exception.

The Clerk: Defendant Seymour Salb, please rise.

The Court: Mr. Martin, do you have anything to say before the Court imposes sentence upon the defendant Salb?

Mr. Martin: Yes, your Honor. I know your Honor has presided at the trial and is fully familiar with the facts as they were developed during the course of that trial. You know the nature of the theft that was involved. I would

merely point out to your Honor that whereas the government in its proof at trial limited, for example, its testimony (2915) to the value of these cultures and processes to the American Cyanamid Company to certain narrow issues, it should be brought to your attention that the records of American Cyanamid Company which were presented to me indicated that that company spent over $24 million in developing and improving the cultures and processes that were part of this case. Certain of that value was, of course, given up when they surrendered these cultures and processes to the Patent Office to obtain patent protection, but a good deal of that value was represented in the processes and the cultures which these defendants stole and transported to Italy.

With respect to the defendant Salb, there is no question that the defendant Sharff carried on the business activities of Biorganic Laboratories Company. However, I think the evidence before your Honor indicates that the defendant Salb was totally aware of the illegal nature of those activities and was a full participant in them. It was Mr. Salb who brought Dr. Fox and Mr. Sharff together. He actively participated in the transfers of stolen triamcinolone and the CTC cultures. He was also a party to the attempt to get Mr. Siegfried Muller to (2916) steal additional cultures from the Lederle Laboratories.

In addition, your Honor, to the matters that were directly before you in this case, you may recall that during the course of the trial I attempted to avoid as much as possible any reference to the question of vitamin B_{12} in order that no prejudice be interjected before the jury. However, at the time of sentence, when I know your Honor is trying to

determine the character of the defendant, I think it should be brought to your attention the fact that Sharff and Salb were engaged in a similar transaction to that involving the CTC andDMCTC with regard to vitamin B_{12}.

The Court: Pardon me, Mr. Martin. You are not going to recite a series of facts to me upon which the defendants have not been able to answer, are you?

Mr. Martin: Well, I did intend to bring to your Honor's attention that there is this other circumstance, yes.

The Court: Do you want me to conduct a trial? The defendant would deny it.

Mr. Martin: But I think this is a matter which could properly be considered.

The Court: I don't think so, Mr. Martin.

(2917) I have asked the probation office many times never to put that type of material in my probation reports. These are charges which have not been leveled against the man in open court, charges which that person has not been able to answer in open court, and I will not take such charges into consideration in imposing sentence.

Mr. Martin: Then, your Honor, to summarize briefly the matters that were brought out during this trial, I think that the evidence clearly showed that he was an active participant in an illegal venture fully knowing the scope. He has indicated no remorse for the crime of which he stands convicted.

The Court: Mr. Polakoff, do you have anything to say before I impose sentence upon this defendant?

Mr. Polakoff: Yes, your Honor. As far as the facts in the case, your Honor, we all have to accept the jury verdict, and I believe that no one is more familiar with the testi-

mony than your Honor. I just want to point out that based upon the government's testimony Biorganic really was a small cog in this scheme of stealing and transporting these micro-organisms. You have heard all the other names mentioned (2918) and I am not going to repeat them, all the other large companies that were involved. You have heard the part that Salb played in that matter.

I just want to address myself, your Honor, to the fact that on Salb's part there was no violation of employer-employee ethics; that he didn't steal any antibiotics or the organisms from which they are made and that he did, according to the jury verdict, receive property that had been stolen. No profit was derived from it. In fact, all the testimony indicated that the venture was practically a total loss.

Your Honor is familiar through the probation report, of course, which counsel has not seen, about his family life, his character and his past history. He has been in business in Biorganic for twenty years and I have been informed that they never were charged with any Food or Drug violation or any other violation dealing with the drug industry.

I submitted to your Honor on Tuesday morning to your secretary a couple of hundred character letters. These all came from the community in which he resides. It was a voluntary act on behalf of people of the community who formed committees, (2919) who interviewed people and obtained these letters.

Your Honor can realize it would be impossible for the defendant himself to obtain the array of character letters that were submitted to you. It is Salb's first offense. He has never been in trouble. He has been a good citizen, other than for this incident here. He is a family man and, as I

pointed out to your Honor, it was an unfortunate venture through which no profit was derived, and I trust your Honor will be as lenient as the circumstances warrant in your opinion.

The Court: Mr. Salb, do you have anything to say before the Court imposes sentence upon you?

Defendant Salb: No, your Honor.

The Court: I will pass on to the next defendant, Mr. Sharff, before the actual imposition of sentence.

The Clerk: Nathan Sharff, please.

The Court: Mr. Martin.

Mr. Martin: If your Honor pleases, at the trial the government's evidence showed the defendant Nathan Sharff was not a man who merely took advantage of an illegal situation which presented itself to him but that he sought out this situation, developed (2920) it. He was a moving factor in the conspiracy. He sought out the outlets for the stolen triamcinolone. He sought out the outlets for the cultures and processes that had been stolen from Lederle Laboratories. This was a profitable venture for the defendant Sharff. He sold approximately two thousand grams of triamcinolone for approximately $30 a gram. He would have paid $10 a gram for it. He received $130,000 from Mr. Wawretschek on the sales of cultures and processes involved in this case, so it was certainly a very profitable venture from his point of view.

In addition, your Honor, there is nothing to indicate that the defendant Sharff has any remorse for the crime that he committed. In fact, it is evident from the course of this trial that he attempted to make use of perjured testimony to secure his acquittal on this charge. The testimony of Mr.

Kevan, which was offered on behalf of the defendant Sharff, was, under your Honor's instructions to the jury such that if it was not believed—

The Court: That doesn't mean it is perjured testimony, Mr. Martin, if they don't believe it. That means that every person who loses a case in this court (2921) is a perjurer. Isn't that true?

Mr. Martin: Not necessarily, sir.

The Court: I don't consider Mr. Kevan was a perjurer. When you make charges of that type, Mr. Martin, you are making very serious charges which involve an individual's fundamental rights. You can't label Mr. Kevan a perjurer —he has never been tried for perjury—and then say that you consider him a perjurer and therefore I must attribute to Mr. Sharff that he put perjured testimony on the stand. I won't do it.

Mr. Martin: I submit to your Honor that there is nothing to indicate that Mr. Sharff has any remorse for the crimes which he stands convicted. I submit the evidence of that guilt was overwhelming in that case.

The Court: I may add, Mr. Martin, that if you think Mr. Kevan's testimony was perjured I think you have a duty to have a grand jury investigation of it.

Mr. Martin: Yes, sir, I agree with your Honor.

The Court: Mr. Van Riper.

Mr. Van Riper: May it please your Honor, (2922) I hope that I have some realization of the problem which confronts the Court at this time, as in every case. I realize there are many things that have to be taken into consideration, and despite our original plea of innocence the jury decided otherwise and we have to accept this as a fact at

this moment and for the purposes for which we are now here.

Your Honor has disposed very quickly of the district attorney's reference to B_{12} and to perjury, but I can't help but be shocked to think they would be referred to. There has never been any indictment on B_{12} whatsoever so far as this defendant is concerned.

If your Honor please, your Honor, of course, is fully familiar with the testimony as it was developed at the trial. I don't recall any testimony which would indicate that Mr. Sharff received $130,000, as the district attorney says he did. There was some testimony of payments by Wawretschek, it is true, but I don't recall any testimony which shows that any money in anything like that amount went to this defendant Sharff. There isn't any question but what they were engaged in an illegal and immoral activity. There isn't any question about that. Sharff did not (2923) initiate it. He didn't go to Lederle or to Lederle employees. A Lederle employee came to him.

Now, I appreciate the fact that it can well be said that if it weren't for those who had disposed of it afterwards that there would not be any thieves in the first instance. That is true. But Sharff, as Mr. Polakoff has said with reference to Salb, did not violate any relationship which existed between him and Lederle. He did not practice disloyalty or deceit in that regard.

Now, the evidence showed they carried on an activity and obviously carried it on for the purpose of attempting to make at least a profit, but I don't recall that there is any evidence that showed that he made any real profit of any consequence whatsoever. The fact is that today, as

I assume the probation report will show to your Honor and has already shown to your Honor, that Sharff is practically without any resources except the little home which he owns, and I think that is encumbered by a mortgage.

The district attorney made mention of the fact or made the statement that Mr. Sharff has not shown any remorse. Well, I don't quite know where he would be supposed to show that remorse, if your Honor (2924) please. If the district attorney had the experience with him that I have had in the last weeks and months he would have seen plenty of evidence of remorse. There has been no other place where Mr. Sharff could have shown it.

It is true that he has not testified for the government. It is true that he has not made any confession. He has to rely on the testimony as it was produced and he has not taken the stand to deny it and has not in any way committed any other offense. If one is to be punished for going to trial, I don't think that is quite in accordance with our present-day method of the administration of justice.

Sharff went to trial, as he had a perfectly legal right to do. He went to trial. He had a perfect right as a citizen and as a defendant in a criminal case to put the government to its proof. Now, I appreciate the fact that there are situations where it can be said: Well, the man didn't go to trial. He pleaded guilty. He saved the government the expense of trial, whereas this man by going to trial, it may be said, cost the government the expense of a trial. That is probably true, but I think that is the cost of the administration of justice as we have (2925) it in this district and in this country today. Perhaps he should bear

some part of the expense of that trial. I don't know. That is a matter, of course, for your Honor to decide.

I am sure the probation report has shown to your Honor that with the exception of this offense Sharfff has lived a decent, clean life. Several letters from his neighbors and fellow townsmen have been submitted to your Honor. I think the answer to that always is: You thought he was a fine man. You thought his character was good, but he committed this offense and the jury found that he committed this offense. That is true. The letters written are indicative of the fact that he had lived a decent life as a decent citizen and as a decent family man. He has a wife, and I think the probation report shows that since she testified at the trial she has been helping to keep the family by working as a school teacher, a position she fortunately has. They have two children, a boy and a girl, both of whom are in college.

There are many things to be considered in the imposition of sentence. The law must be vindicated. I think the law is vindicated in this (2926) case or in any other case when a conviction has been secured. That in itself vindicates the law.

Then there is the defendant who has to be considered, and then there is society as such. Society includes a man whose property has been taken or has been injured and he has a right to be protected against a repetition of that either by this defendant or by some other defendant, and other members of society who own property have a right to feel they have protection against it being taken away from them or against it being used improperly. It seems

to me that the mere fact of a conviction goes a long way towards securing that right.

Now, the defendant himself and his family are a part of society and I know that at this juncture of the proceedings the question also arises as to whether there shall be a jail sentence or shall there not be a jail sentence. I have often wondered, if your Honor please, except in the case of one who is of a vicious character and of such a nature that for the presentation of his fellow men he has to be put away, whether or not putting people in jail really accomplishes anything or really serves any purpose. In a case of this kind, I doubt very much if (2927) it would, sir. It seems to me that if a sentence was imposed here and the execution of it suspended and the defendant placed on probation for a substantial period of time, that the result would be much more satisfactory to society. His wife and children would not have to have the stigma—and they already have one stigma, that of having their husband and father convicted—they would not have to have the stigma of having their husband and father in prison. When his time was up, if he were in prison and came out, what would he do? How he would then overcome the difficulties that had been imposed upon him I don't know.

Incidentally, I have submitted to your Honor a letter from Mr. Sharff's physician showing what his physical condition is, and without repeating what is in the letter, because your Honor has it, it indicates, as your Honor knows, that his physical condition is not a good one. I submit that under all the circumstances, weighing all of the equities and charging us with all the debits which we are entitled to be charged with, and we must be charged

with them here at this stage of the proceeding so that society will be served, that the law would be vindicated and (2928) that justice would be done by some sort of a sentence other than actual confinement.

The Court: Mr. Sharff, do you have anything to say before the Court imposes sentence?

Defendant Sharff: No, your Honor.

The Court: Call the next defendant.

The Clerk: Caesar Bottone.

Mr. Martin: Your Honor with respect to the defendant Bottone, your Honor heard his testimony at the trial. There is one matter I would point out to the Court and that is that there was mention at the trial that the defendant Bottone had been previously convicted of a violation of the Food and Drug Act that was characterized by defense counsel as merely a technical violation. The government would not concede that. I don't know how your Honor's prohibition with regard to other matters —

The Court: It is a matter of record.

Mr. Martin: —on which Mr. Bottone was convicted—the evidence at the trial did indicate that a drug being shipped was hydrochlorothiazide, which is a patented item, and the evidence at the trial showed that that drug had been imported from the country of Italy as procaine hydrochloride, a nonpatentable (2929) drug, which bears a minimal duty, whereas hyrochlorothiazide bears a substantial duty. There was smuggling involved in that as well as a violation of certain patent rights of others.

There was at the trial some reference, your Honor, and here again I don't know how your Honor's prohibition

would run, but I do feel that defense counsel for Dr. Bottone, in attempting to throw a black color on Mr. Cancelarich, pointed out to the smuggling of certain B_{12} that was brought in through Mr. Cancelarich's request. In fairness to the others, it was at the request of Dr. Bottone that that B_{12} was delivered to Dr. Bottone when it was brought into this country.

With regard to the other matters, your Honor is fully familiar with his participation in this conspiracy from the evidence at this trial.

The Court: Mr. Novok.

Mr. Novok: May it please your Honor, of course we are bound, as the other two defendants are, by the verdict of the jury. However, your Honor will undoubtedly recall that Dr. Bottone pleaded innocent to the charge as leveled against him by the government; that in furtherance of his plea of innocence he took (2930) the witness stand and made a full disclosure of all knowledge which he had concerning this situation, and I respectfully point out to the Court that the evidence in this case did disclose that Dr. Bottone's part in this whole conspiracy was nothing more than being a dupe used by the others. There was no testimony in this case nor did the government seek to offer any testimony that Dr. Bottone had anything whatsoever to do with the actual stealing of organisms or the purloining of the papers or procedures from Lederle; had absolutely nothing to do with the thievery involved among those who had pleaded guilty before him, and his only connection with this situation was that they had transported, without his knowledge, some organisms to Italy. Your Honor will recall, of course, that there was no question of any profit motive to Dr. Bot-

tone; that he did not make one penny out of anything that was going on at this time. He received no money. As a matter of fact, he lost the sum of $42,000 by an unfortunate investment.

Under all of the circumstances as brought out during the course of the trial, sir, we ask that the Court take all of these matters into consideration (2931) in imposing sentence, bearing in mind that at best it might be said in behalf of the government that Dr. Bottone was but a dupe in this entire situation.

The Court: Dr. Bottone, do you have anything to say before the Court imposes sentence upon you?

Defendant Bottone: No, sir.

The Court: Will the defendants Salb, Bottone and Sharff please rise.

I must say the Court has never been deluged with as many letters on behalf of defendants facing sentence as it has in this case. All of the letters state the defendants have suffered enough; that they are intelligent people with families. The intelligence of these defendants, including those who pleaded guilty, is one of the shocking aspects of this case. The purpose of incarceration is not only to act as a deterrent to future criminal action by the defendant but also to act as a deterrent to other people who may have a mind to engage in siimlar criminal activities. The effect of the deterrent to others in this case is manifest where everyone involved holds a doctorate or master's degree and all of you are highly trained and (2932) intelligent people. Now, admittedly you did not steal the processes or the cultures. They were stolen by others who did it on their own, wilfully and knowingly, but you were there to

pick it up. You were there to move it on its way and in some instances even encouraged the other defendants who pleaded guilty to engage in the acts that they were engaged in.

I think I have to be a Solomon to distinguish between the culpability of the three defendants to whom I am now talking. Mr. Sharff, obviously you were the head of this. Your manipulations were like somebody moving chessmen around a board. The string of exhibits and correspondence between you and Cancelarich alone show that.

Mr. Salb, you were part and parcel of it and you knew that it was going on, and so did you, Dr. Bottone, and that midnight ride from Milan to London is one of the unexplained facts in this case.

After reviewing the evidence carefully and taking into consideration all of the factors involved, knowing that none of you are ever going to anything of this type again, but also knowing the right of society to be protected not only against (2933) yourselves but others of like mind and like intelligence who may engage in this type of activity, I will impose a sentence of two years on Mr. Salb and Mr. Sharff and Dr. Bottone.

Mr. Polakoff: Will your Honor fix bail for the appeal?

The Court: Yes.

What is the present bail, Mr. Polakoff?

Mr. Polakoff: A thousand dollars for Mr. Salb.

Mr. Novok: $2500 for Dr. Bottone.

Mr. Martin: And $2500 for Mr. Sharff.

The Court: I will continue the bail.

Mr. Martin: Is that sentence concurrent on each of the counts?

The Court: To clarify it for the record, I impose two years on Mr. Salb on counts 1, 8 and 10 to run concurrently.

I impose a term of two years on Mr. Sharff on counts 1, 8, 9 and 10 to run concurrently.

I impose a sentence of two years on Dr. Bottone on counts 8, 9 and 10 to run concurrently.

I will continue the defendants in the existing bail pending appeal.

(2934) Mr. Van Riper: I have been used to sentences that say in the custody of the Attorney General for two years. Does the notice of appeal have to include—

The Court: The form says that. Do you have the form of sentence, Mr. Martin?

Mr. Martin: No, your Honor. That is one form our office doesn't have.

The Court: The form says he is to be in the custody of the Attorney General.

(2935) The Clerk: John Cancelarich.

Mr. Martin: As to each of the remaining defendants, as your Honor knows they each testified during the course of this trial. Each of them pleaded guilty. The government at the time they began to cooperate told them that no promises could or would be made to them, but, however, that the matter of the extent of their cooperation would be brought to the attention of the sentencing judge for whatever consideration he would give it.

In fulfilling that, your Honor, I would say as to the defendant John Cancelarich, he has cooperated in the course of the investigation and prosecution of this matter from its inception. When he was first questioned about these matters by counsel for Cyanamid he completely admitted

his part in these transactions. Thereafter, during the course of the preparation of the case in this office and the investigation that accompanied that he made himself freely available to government counsel. He testified before the grand jury. In the preparation of this case he made himself freely available to me whenever it was necessary for me to consult with him, which involved often coming down from his home in Maine on weekends, (2936) sometimes on very short notice, and during the course of the trial itself, after the government's case was rested and the defense was put on, it was again necessary to call Mr. Cancelarich down on very short notice to confer with government counsel. (2937) He has always done this willingly. There is no question in the mind of anyone connected with the government that he has fully cooperated with the government during the course of this prosecution.

The Court: Do you represent Mr. Cancelarich, Mr. Bauman?

Mr. Bauman: Yes, sir, I do.

The Court: I thought I had received a letter from Mr. Brown on Mr. Cancelarich.

Mr. Brown: It was for Leonard Fine, if your Honor please.

The Court: Who represents Mr. Fox?

Mr. Chapman: I do, your Honor.

The Court: And Mr. Gerace is represented by Mr. Howell; is that correct?

Mr. Howell: Yes, your Honor.

The Court: You may proceed, Mr. Bauman.

Mr. Bauman: May it please the Court, your Honor has before him a full and complete report by the Probation

Department, I have no doubt. Many of the facts that I intend to put before your Honor must be necessarily contained in that report, nonetheless I think the interests of justice require me to call certain things to your Honor's attention in (2938) connection with the defendant John Cancelarich. That he has committed a crime, there can be no doubt. As you were informed by the United States Attorney, he pleaded guilty immediately upon his arraignment in the indictment, but long before that his cooperation started. As a matter of fact, when this matter first came to the attention of the Cyanamid people, as you were informed by the United States Attorney, they sent someone to see him. From that moment forward and without hesitation John Cancelarich has cooperated to the fullest. I say responsibly and seriously that I have never seen any case of greater cooperation with the government and with the party who was wronged by his action. As a matter of fact, when his lawyer informed him in Italy that the Federal Bureau of Investigation wanted to talk to him, he immediately returned, made himself available to the FBI, made himself available to the United States Attorney and to the grand jury and he testified in the grand jury. That was the beginning of his cooperation.

He has testified in civil suits telling the truth wherever he has gone. As a matter of fact, Judge Aurelio in the Supreme Court of New York County (2939) made a specific finding that the testimony of John Cancelarich was true in a suit brought by Cyanamid against some of the people involved in this matter. He has testified in this case and, indeed, has participated with representatives of Cyanamid, Merck and the government in running down

whatever leads there were and in helping to run down whatever there was to run down always without complaint and always in penitence for what he had done. It is his estimate, and I ask your Honor to take it quite literally, that he has spent since this matter started some 200 days in cooperating.

I respectfully suggest that John Cancelarich has been punished enormously already. As your Honor knows, he, naturally, lost his job with its great possibilities for advancement at Cyanamid immediately. He has obtained other employment, as your Honor must have been informed in the probation report, at which he works very hard and at which he has gained the respect and admiration of his employers and fellow workers. But his future in his chosen profession is, I think we must all admit, permanently limited by his judgment of conviction in this case. As a matter of fact, there is presently a proceeding (2940) brought by the American Society of Chemical Engineers to discontinue his membership.

Your Honor must know, likewise from the probation report, that he has a wife and four small children, all preschool age. I met his wife at the beginning of this case and I know how distraught and distracted she has been throughout this entire matter, and just before John Cancelarich testified before your Honor for the government, the culmination of these years and everything that had happened brought her to a nervous breakdown from which she has just now recovered.

What has John Cancelarich done with his life since this has happened other than cooperate? Your Honor knows that he has obtained a job. Your Honor knows—I say this

because it must necessarily be in the probation report—that he has worked hard and does work hard. Your Honor may not know the full extent of the communal activities in which he has engaged in attempting to resurrect his life in attempting to make himself a useful and contributing member of society, and for that reason I asked if he would write me a letter setting forth some of the community work he does. I wonder if I might have (2941) the court's permission to submit this letter to the court to become part of the court's file, if your Honor pleases, so that I do not have to spread upon the record the many and personal activities in which Mr. Cancelarich has been engaged.

I respectfully submit to your Honor that if contrition, atonement, cooperation and rehabilitation are meaningful to the court in the administration of justice, I respectfully suggest in that event that John Cancelarich has done everything that he can to right the wrong he has done and to earn the consideration of the court. I respectfully submit to you, sir, that in the three and a half years since his indictment he has proved himself, day by day, event by event, in his repentence in his business life and personal life and I respectfully suggest to you, sir, that he stands before you a thoroughly and completely rehabilitated man.

For all these reasons, your Honor, I commend him to the utmost consideration that the court sees fit to extend.

The Court: Mr. Cancelarich, do you have anything to say before the court imposes sentence on you?

(2942) Defendant Cancelarich: No, your Honor.

The Clerk: Leonard Howard Fine.

Mr. Martin: As with Mr. Cancelarich, Mr. Fine has cooperated with the government and with counsel for Amer-

ican Cyanamid in their civil litigation arising from these defendants from the time that he was first contacted by the Cyanamid attorneys. Since that time he has made himself fully available both to government counsel and the Federal Bureau of Investigation as well as Cyanamid counsel whenever it was necessary for the preparation of the cases in which we were involved. There is no question that from the outset he has told all of the facts as he has known them truly and honestly, and this has been corroborated by the other evidence that we have and there is no question in anyone's mind connected with the government, your Honor, that Mr. Fine has given complete cooperation to the extent that he could.

The Court: Mr. Brown, do you have anything to say before I impose sentence on the defendant?

Mr. Brown: Yes. If your Honor please, I have represented Mr. Fine for 39 months and in the course of that time I have gotten to know him and (2943) state that in my opinion I believe that he has rehabilitated himself to a large extent.

There is no question here, your Honor, that a wrong has been done and that a wrong against society must be righted, but I think that, similar to the pattern of John Cancelarich, Mr. Fine has exhibited an extraordinary cooperation in an effort to right that wrong, a cooperation, if your Honor please, not only with the United States but a cooperation with the victims of the wrong, the corporate—

The Court: I'm not the least bit interested in the cooperation with American Cyanamid, Mr. Brown.

Mr. Brown: If your Honor please, your Honor mentioned that one of the shocking factors here was the intel-

ligence of the defendants and, if I may, I would like to comment on that by saying that while Mr. Fine, to my knowledge, has sufficient intelligence to be an able chemist, he has exhibited to me an incredibly naive attitude with regard to the problems that he was involved in, and I believe that in the course of the past 39 months this naivety has been remedied to a great extent. His cooperation with the United States, as Mr. Martin has said, has (2944) said, has been complete. He has, like Mr. Cancelarich, given a tremendous number of days to the intricate facts here, and you have heard Mr. Martin say that there is no question of the truthfulness of what he has disclosed.

I think that it is also fair to call your Honor's attention to the fact, as your Honor sat on this case and was the trial judge, that the cooperation of Mr. Fine with the United States Government was a significant factor in bringing about the indictment. Mr. Bauman mentioned that his client was approached in Italy and immediately returned. I think it is significant that the man who did that and did bring him back was Leonard Howard Fine.

Now, if your Honor please, you also mentioned that those defendants that you just sentenced treated others as chess men. One of these chess men, I submit, was Leonard Fine. His part was a limited and subordinate part out of which he received nothing. He has demonstrated repentence and atonement and I think that I will leave it to the probation report to cover that. I'm certain that it would reflect those factors, since the probation people have visited (2945) Mr. Fine's home each year since the indictment.

I think that Mr. Fine's career as a chemist has been more than seriously impaired. What he has already suf-

fered will be a permanent mark on him for the rest of his life. I think that incarceration, if your Honor please, is uniquely unnecessary in Mr. Fine's case in that I think that he has been rehabilitated. He is not dangerous to society. His incarceration after 39 months, after what he has done and the way he has lived and the way his attitudes have changed would not be a deterrent to others if he were confined. On the other hand, confinement of Mr. Fine would have a harmful effect on his wife, a devoted, intelligent person who has been subjected to this difficulty and his three children, a son, 11, a son, 9, and a daughter, 5 years old. My understanding is that there is no other means of support. To indicate the type of person that Mr. Fine is becoming, the president of the company for whom he works has come here and is ready to take any part in the proceeding your Honor may wish. Mr. Edward Shefferd, the president of Corko Chemical, for which Mr. Fine has worked for three and a half years, is (2946) here and has written your Honor a letter with respect to his character and the way he has operated.

I respectfully urge, then, your Honor, in these unique circumstances that Leonard Fine not be imprisoned. I don't believe that he is a danger to society or that incarceration would rehabilitate him further. He appears to understand the nature of his prosecution. He knows the offensiveness of his prior conduct and he has during the past years sought to be a responsible and law abiding person.

Thank you, your Honor.

The Court: Mr. Fine, do you have anything to say before the court imposes sentence upon you?

Defendant Fine: No, your Honor.

The Clerk: Martin Fox.

The Court: Mr. Martin.

Mr. Martin: With regard to the defendant Fox, his cooperation with the government began in March of 1964. He has given the fullest cooperation possible. He has made himself available to the Federal Bureau of Investigation and to members of the United States Attorney's office and has set forth (2947) fully his participation in these crimes and the extent of the activities to which he has information. Also, your Honor heard his testimony at the trial. He testified fully, admitting all his own faults, all his previous wrongs. I think he was totally candid and has been throughout with the government and the court.

I would just also point out to your Honor as to the testimony of Dr. Fox there can be no question as to its truthfulness at the trial here. It was fully corroborated by other evidence which was produced at the trial.

The Court: Mr. Chapman.

Mr. Chapman: Your Honor, I think I should make known to the court the fact that I'm not an entire stranger to the case, although I appear here for the first time on behalf of Dr. Fox. Originally he came to me but because of commitments I couldn't undertake to represent him and this was long before anything happened which resulted in his incarceration in a civil jail for some seven months. I did not represent him at that time, and his incarceration resulted either from poor advice or his own inability to understand his (2948) position. However, he did come to an understanding of it and, as Mr. Martin pointed out to you, his cooperation with the government has been considerable.

I do not know very much about the facts in the case except as I have gleaned them from some remarks when I had a conversation with Mr. Murdock as to Dr. Fox's participation, and I understand that he did something which cannot be condoned. He sold somebody's property, which he was instrumental in creating but which he was paid for and didn't belong to him. His conception of his right at that time certainly was a wrong one. However, I think that he tried to atone for it and tried to make amends as best he could and that he has exposed himself, as I have been told, on the stand to possible prosecution for tax evasion and things of that matter.

He talked to me about it and I said, "That is what you have to face. You must accept the situation as you created it but you must tell the truth now." Throwing aside all these possibilities and without regard to what the future might hold for him he did take the stand and what he said at that time your Honor knows best. It has been referred (2949) to by Mr. Martin as absolutely truthful cooperation and that whatever he said was corroborated, indicating that in no manner, although he testified against others, did he attempt to embellish nor attempt to make his side appear better than it was.

It may be that a great deal of his background was brought out during the trial. He is a person with a doctorate. He has been stricken from the rolls of the American Chemical Society as a result of his activities in this matter, so now he has a small position out in New Jersey to which he has been relegated for the purpose of supporting his wife and two children. His wife has an aversion to him personally for what he has brought her to. His children have been

held up to ridicule and have been taunted by others because of the publicity given in magazines and newspapers. He brought it all on himself. Your Honor will determine by the judgment in this case whether he has atoned, compensated for what he has done. I heard your Honor say as to the corporation—

The Court: They have enough money to take care of themselves, Mr. Chapman.

Mr. Chapman: As to the corporation, they (2950) might consider raising the salaries of some of their employees thereby not making them amenable to that sort of temptation. We have gone into that in bank matters. They did write you a letter and I know that you will take into consideration their recommendations. They were injured in this case, no question about it. They pointed out to you what he has done for them indirectly by what he has done for the government.

The Court: Don't you think, Mr. Chapman, that there were hundreds of thousands of dollars expended by Cyanamid in this case and wouldn't they have been a little better off if they paid their people with doctorate degrees higher salaries than students out of law school for two years are paid in law offices?

Mr. Chapman: Yes, your Honor. I just made mention of the fact. The very same thing you said, I said. That is a situation I noticed and had it in my notes. Nevertheless, their feeling in the matter toward him is not vindicative. I don't think the government has any desire to see that he is punished any further. I trust that your Honor will be of the same mind.

(2951) The Court: Mr. Fox, do you have anything to say before the court imposes sentence?

Defendant Fox: No, sir.

The Clerk: Joseph Gerace, please.

The Court: Mr. Martin.

Mr. Martin: With regard to the defendant Gerace, he was the first of the defendants to begin cooperating in this matter.

The Court: If it wasn't for him you wouldn't know about the case, would you, Mr. Martin?

Mr. Martin: I would think that is probably a fair characterization, your Honor.

I would say since that time he cooperated fully. As your Honor knows, from hearing the testimony at the trial, his testimony was limited because, but merely because his knowledge of the facts were limited. His role in the conspiracy was limited. There was no question that he has cooperated to the fullest extent possible in the light of his limited knowledge, and there is no question that the testimony that he gave was and is truthful.

The Court: Mr. Howell.

Mr. Howell: Your Honor, I think Mr. Martin has thoughtfully pointed up what has never occurred (2952) as a coincidence to me, that Mr. Gerace's name has always been last in the indictment, in the count to which he pled and in the roster of defendants that has now come before you. It is true that Mr. Gerace was the first to commence cooperating with the authorities and with the Cyanamid Company and through the Cyanamid Company with the authorities. In March, your Honor, of 1962, Mr. Gerace, without retaining counsel, without consulting anything but his own conscience,

delivered the first of several statements to the Federal Bureau of Investigation. That statement was 16 single spaced pages, and was followed with other statements at other times of equal length.

He was indicted in November, so that he fully was conscious that at that moment contrition had taken him. He understood then what he had perhaps not understood at the time he played his small but perhaps vital part in this crime. He has fully admitted and spread himself upon the record, and I mention this only because I understand his appearance at the trial was quite brief and your Honor may not remember the extent and degree of cooperation that went into that brief appearance (2953) on the stand.

The Court: I remember.

Mr. Howell: I suppose I need not mention that Mr. Gerace was only indicted on only one substantive count and was not reindicted in the 1964 indictment. He pleaded guilty immediately and was released without bail.

Mr. Gerace accompanied Cyanamid counsel to Europe expressly for the purpose of discussing the ramifications and the entire scope of what had been done with Mr. Cancelarich and to induce him to return to the United States.

As Mr. Gerace did little and received nothing—I am not condoning what he did do—but if there was a dupe, if there was a pawn in this chess game of Mr. Sharff's, I submit that it was Mr. Gerace.

Your Honor made reference in addressing the other defendants to the degree of demonstrated intelligence of all defendants as testified to by their advanced college degrees and the doctorates held. This, your Honor, does not apply in Mr. Gerace's case. Mr. Gerace is a laboratory technician

strategically located for the purposes of this (2954) conspiracy but susceptible to being impressed, to being flattered by those superior to him in position and potentiality in education and station in life, and these were the ingredients, your Honor, I submit, perhaps unfortunately, in our society out of which dupes are made.

Your Honor of course does have the probation report. I'm sure it shows your Honor that Mr. Gerace, never a highly paid employee, at the point the disclosures of this affair were made, of course, lost his position at Lederle at that time. I'm sure that report shows your Honor that he was, to all intents and purposes, without gainful employment for over a year. He was able to work in his father's store as a clerk and earn something in the nature of $30 to $40 a week during that period. However, through perseverance, through self study and through the help of many who believed in him and believed in his genuine remorse, Mr. Gerace has returned to work in his field of experience and is today employed by the United States Chemical and Plastics Company, a subsidiary of the Coppers Company. He has risen progressively in the past three years from a $80 (2955) laboratory technician to a manager of quality control color at almost double the salary. He has prospects of further advancement. He has been admitted to membership in the Optical Society of the United States and to the International Color Association. His feet are certainly planted on a path that all society can appreciate.

His present employer, your Honor, made himself available to appear here today. I discouraged him. I thought that particularly because of the dimensions of this case and the many who would be speaking for all defendants it

would be superfluous, but he was prepared to come and it was I who told him that I did not think an actual appearance would be necessary.

Mr. Gerace is the father of three children and lives with his wife in his own home up in the Haverstraw area. He is a volunteer fireman in his community, a point which would be disregarded in the metropolitan centers, but one which is considered a highly valuable service for those of us who live in the rural communities, such as I can testify to myself. I have had myself on two occasions need for volunteer firemen.

(2956) This is Mr. Gerace's first offense and first involvement in a criminal proceeding of any nature. I think, your Honor, it is not only reasonable but it is mandated that we assume that there will be no such involvement in the future for Mr. Gerace.

Under the circumstances, as I have come to know this case and as I have come to know Mr. Gerace I can perceive no advantage to society nor would the ends of justice be secured through any sentence involving incarceration as far as Mr. Gerace is concerned.

The Court: Mr. Gerace, do you have anything to say before the court imposes sentence upon you?

Defendant Gerace: No, your Honor.

The Court: It is perfectly obvious, Mr. Gerace, that you were even a cog in this conspiracy. It was so small that no one could ever see you. It is also true that you are the only one in this entire conspiracy who came forward voluntarily, spurred only by pangs of conscience within yourself, to tell the story to Cyanamid. If you had

not opened your mouth I doubt if anybody else would have.

The court will suspend sentence upon you, (2957) Mr. Gerace, on counts 4 and 5 of the indictment, to which you pled guilty.

Defendant Gerace: Thank you, your Honor.

The Court: Mr. Cancelarich, Mr. Fine and Mr. Fox, would you stand up, please.

Pleas are always made for leniency where defendants plead guilty and cooperate with the government. I must advert to what I said when I sentenced the other three defendants. All of you are intelligent men with degrees, Dr. Fox with a doctorate, Mr. Fine and Mr. Cancelarich with master's degrees. Nobody told you to do this. You did this on your own. You weren't goosed, as the saying goes, by either Salb or Sharff or Bottone. The three of you went out and did this, stole from your employers for gain.

Mr. Cancelarich, you said that plainly and clearly on the stand. This was something that came from your own heads and your own hearts and your own minds and you did it and you continued to do it and you fell out among yourselves, and that story is something else for another day. If Mr. Gerace had not gone to American Cyanamid I have great doubt whether any one of the three of you (2958) would have opened your mouths. It is sort of a heads I win, tails you lose situation. If you are not caught you will keep the profits and if you are caught you confess immediately and expect the court not to impose a jail sentence.

Mr. Fox, as far as I know you made about $80,000 on

this deal. There is some testimony of money given to Mr. Cancelarich. I'm not quite sure how much you made, Mr. Fine. But, in any event, I think for the reasons I gave before that as deterrent to other people of your same mentality and in the same areas of trust a jail sentence must be imposed. Consequently, I will impose a six-month term on Mr. Cancelarich on counts 1, 2, 3, 4 and 5 of the indictment of December 21, 1962, said term to run concurrently on all counts.

Mr. Fine, I will impose a sentence upon you of six months on counts 1, 2, 3, 4 and 5 of the indictment dated December 21, 1962, said term of imprisonment to run concurrently.

Dr. Fox, I will impose the same sentence upon you on counts 1, 2, 3, 4, 5, 6, 7, 10 and 11 of the indictment of November 2, 1964, said period of incarceration to run concurrently.

(2959) Mr. Chapman: May I respectfully request that the service of the sentence in the case of Dr. Fox, whom I represent, be deferred for a matter of some two weeks? He has certain experiments that he has with his employer that have to be concluded.

The Court: I will grant the application.

Mr. Chapman: Your Honor, Judge Boxer of the Rockland Court, who is the father-in-law of Dr. Fox, has asked me twice whether he might speak to you and rather than have him think that I have ignored him I'm asking whether you wish to have him talk.

The Court: Our procedure is to have all recommendations submitted in writing to the court. We have no oral

presentation except by the attorneys and the defendants themselves.

Mr. Boxer: I was going to say one thing if your Honor please. He has already served eight or nine months.

The Court: If you want to continue the discussion I will tell you that he is the manipulator of the whole thing and that he made at least $80,000 that I know of.

(2960) Mr. Bauman: I hope your Honor will indulge me long enough to say that in the case of Mr. Cancelarich a sentence works extraordinary hardship in that his wife is not through with her mental problems. There are four children I believe under the age of six. I don't know at this moment and I don't think he knows who is going to take care of those children.

The Court: Do you want time, Mr. Bauman?

Mr. Bauman: Yes, I do want time, sir, and I want, respectfully, if I may do so, without offending the court, to ask you to reconsider the imposition of the jail sentence on Mr. Cancelarich in these circumstances.

The Court: Mr. Bauman, the court has had a tortured time for the last two weeks with this case, and the court will not reconsider its determination.

Mr. Bauman: Will your Honor extend his time to surrender for two weeks?

The Court: I certainly will.

Mr. Brown: If your Honor please, for Mr. Fine, may I make the same request of two weeks?

The Court: The application is granted.

Mr. Brown: Thank you, Your Honor.

APPENDIX C

Judgment of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the fourth day of August one thousand nine hundred and sixty-six.

Present:

HON. LEONARD P. MOORE,
HON. HENRY J. FRIENDLY,
HON. WILFRED FEINBERG,

Circuit Judges.

United States of America,

Plaintiff-Appellee,

v.

Caesar Bottone, Seymour Salb and Nathan Sharff,

Defendants-Appellants,

John Cancelarich, Leonard Fine, Sidney Martin Fox, Maurice Rosenblatt, Elio Salvetti, and Nicolo Visconti di Madrone,

Defendants.

Appeal from the United States District Court for the Southern District of New York.

Appendix C—Judgment of the United States Court of Appeals

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

By /s/ VINCENT A. CARLIN
Chief Deputy Clerk

APPENDIX D

Order Denying Petition for Rehearing, etc.

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twentieth day of September, one thousand nine hundred and sixty-six.

Present:

HON. LEONARD P. MOORE,
HON. HENRY J. FRIENDLY,
HON. WILFRED FEINBERG,

Circuit Judges.

United States of America,

Plaintiff-Appellee,

v.

Caesar Bottone, Seymour Salb and Nathan Sharff,

Defendants-Appellants,

John Cancelarich, Leonard Fine, Sidney Martin Fox, Maurice Rosenblatt, Elio Salvetti, and Nicolo Visconti diMadrone,

Defendants.

A petition for a rehearing together with a motion to stay the issuance of the mandate pending a petition for writ of

certiorari to the Supreme Court of the United States having been filed herein by counsel for the appellants Seymour Salb and Nathan Sharff,

Upon consideration thereof, it is

Ordered that said petition for rehearing be and it hereby is denied.

Further ordered that the issuance of the mandate be and it hereby is stayed subject to Rule 28(c) of the rules of this court.

/s/ A. DANIEL FUSARO
Clerk

APPENDIX E

Order Denying Petition for Rehearing In Banc

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twentieth day of September, one thousand nine hundred and sixty-six.

Present:

HON. STERRY R. WATERMAN,
HON. LEONARD P. MOORE,
HON. HENRY J. FRIENDLY,
HON. J. JOSEPH SMITH,
HON. IRVING R. KAUFMAN,
HON. PAUL R. HAYS,
HON. ROBERT P. ANDERSON,
HON. WILFRED FEINBERG,

Circuit Judges.

United States of America,

Plaintiff-Appellee,

v.

Caesar Bottone, Seymour Salb and Nathan Sharff,

Defendants-Appellants,

John Cancelarich, Leonard Fine, Sidney Martin Fox, Maurice Rosenblatt, Elio Salvetti, and Nicolo Visconti diMadrone,

Defendants.

Appendix E—Order Denying Petition for Rehearing In Banc

A petition for a rehearing in banc having been filed herein by counsel for the appellants Seymour Salb and Nathan Sharff,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

/s/ A. DANIEL FUSARO
Clerk

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 699

NATHAN SHARFF,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

VAN RIPER & BELMONT
Counsel for Petitioner
744 Broad Street
Newark, New Jersey

SHELDON LOWE
Of Counsel

32 CASE PRESS INC., 421 Hudson St., N.Y.—OREgon 5-4540

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IN THE

Supreme Court of the United States

October Term, 1966

No.

NATHAN SHARFF,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above entitled case on August 4, 1966. Rehearing was denied September 20, 1966.

Citations to Opinions Below

The opinion of the Court of Appeals is not yet reported and is printed as Appendix A.

Jurisdiction

The judgment of the Court of Appeals was entered on August 4, 1966. Rehearing was denied on September 20, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

Questions Presented for Review

1. Did the Court below err in ruling that the evidence was legally sufficient to establish that the cultures and documents here involved were of the value of $5,000. or more within the meaning of 18 U.S.C. Sec. 2314?

2. Did the Court below err in ruling that the transportation of copies of papers describing the Lederle processes constituted the transportation in interstate or foreign commerce of "goods" which had been "stolen, converted or taken by fraud" within the meaning of 18 U.S.C. Sec 2314?

3. Where co-defendants pleaded guilty and their sentencing was deliberately delayed at the behest of the government for three years and until after they had testified against petitioner, was petitioner deprived of a fair trial under the Fifth Amendment to the Constitution?

4. Whether it is permissible for a Federal judge to impose a more severe sentence upon a criminal defendant because he has exercised his constitutional right to plead not guilty and stand trial.

Constitutional and Statutory Provisions Involved

The constitutional provision involved is the Fifth Amendment to the United States Constitution. It is printed in 1 U.S.C. XLVI and is as follows:

ARTICLE [V.]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for

the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Section 2311 and 2314 of Title 18 U.S.C., which, so far as here relevant, read as follows:

"Sec. 2311. Definitions

"As used in this chapter:

* * * * *

"'Value' means the face, par, or market value, whichever is the greatest, and the aggregate value of all goods, wares, and merchandise, securities, and money referred to in a single indictment shall constitute the value thereof."

"Sec. 2314. Transportation of stolen goods, securities, monies, or articles used in counterfeiting.

"Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; or

"Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities, knowing the same to have been falsely made, forged, altered, or counterfeited; or

"Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce, any tool, implement, or thing used or fitted to be used in falsely making, forging, altering, or counterfeiting any security, or any part thereof—

"Shall be fined not more than $10,000 or imprisoned not more than ten years, or both. * * *"

Statement

Petitioner Nathan Sharff seeks review of a judgment entered on January 20, 1966 in the United States District Court for the Southern District of New York[1] (METZNER, *J.* presiding), and affirmed on August 4, 1966 by the United States Court of Appeals for the Second Circuit (rehearing denied September 20, 1966).

The indictment against petitioner Sharff and others contained several charges relating to the illegal transportation of stolen drug secrets in interstate and foreign commerce.[2]

---

[1] The United States District Court had jurisdiction over the matter because petitioner was charged with violating federal criminal statutes viz., Title 18, U.S. Code, sections 2, 2314, 2315, and 371.

[2] Indictment 64 Cr. 648, filed on July 13, 1964 named as defendants Caesar Bottone, John Cancelarich, Leonard Fine, Sidney Martin Fox, Seymour Salb, Nathan Sharff, and three other individuals who were not tried and who are unimportant in the context of this appeal.

The indictment contained eleven counts, of which appellant was charged with four, viz., 1, 8, 9, and 10. Counts 1 and 9 charge appellant with violation of Title 18, U.S. Code, sections 2 and 2314. Count 8 charges petitioner with violation of Title 18, U.S. Code, sections 2 and 2315, and Count 10 charges him with conspiracy (Title 18, U.S. Code, section 371) to violate these sections.

The present indictment supersedes an earlier indictment (62 Cr. 963) filed on October 29, 1962 which contained substantially the same charges and which issued against Joseph Gerace and all those named in the 1964 indictment except Salb (and one Maurice Rosenblatt). On December 21, 1962, defendants Cancelarich and Fine pleaded guilty to all 5 counts of the 1962 indictment and on January 11, 1963, Gerace did likewise. On November 2, 1964, defendant Fox pleaded guilty to all 9 counts with which he was charged in the present indictment, viz., Counts 1 through 7, and 10 and 11. Sentencing of these four defendants was held in abeyance pending the trial of defendants Bottone, Salb, and Sharff. (A motion by Salb and Sharff, who stood trial, to have the defendants who pleaded guilty sentenced before the trial, was denied.)

"The enterprise that was the subject of this indictment involved stealing and preserving cultures Lederle had developed, temporarily removing and copying documents that outlined manufacturing procedures, and then selling the cultures and the copies primarily for ultimate exportation to Europe." *United States* v. *Bottone, Salb, and Sharff,* F. 2d . (2d Cir., decided August 4, 1966) at 3056-3057. Seymour Salb, Caesar Bottone, and Nathan Sharff "did not steal the processes or the cultures" (R. 2873); they were "on the receiving end." *United States* v. *Bottone et al.* at 3057.

As regards the cultures, the evidence in fact showed that Wawretschek, who was founder and administrator of the Milan firm of Ankermann, constantly complained that the cultures he received from Biorganic (a company operated by Salb and Sharff) did not work out very well; that he was "never satisfied" with the yields he obtained from them; and that the cultures delivered to Ankermann in May 1961 by Cancelarich, following his April 16 trip (the subject of count 8) were valueless, since they produced yields less than those which Ankermann already had (682, 688, 733, 863-4, 867-8, 1224). It further appeared that Wawretschek wanted to rescind his agreement to purchase organisms from Sharff and Salb (2341-2), and that he was ready to "throw them out of Ankermann" (Ex. 137, 1423).

As regards the "documents," the Government's own expert witness from Lederle, Dr. Scholz, made clear the necessity for precision in the writing up of the processes involved in order for them to have any value. He thus testified that the processes for production of these antibiotics had to be followed so precisely in order to achieve the desired results that "differences of one degree in temperature would make

a substantial difference" to success in production (1952-53, 2043). Dr. Scholz further testified, as to the value of the information supplied to a potential commercial producer of these antibiotics, as follows (1803-04):

> "Well, when you consider value, one must include not only the items which I mentioned as being in the standard SOP which were not in the literature, but must also consider the entire text. And this is because a commercial process such as this is not something that depends on a simple trick or even an outstanding technical advancement. It depends on the careful and painstaking attention to all the details of the process day after day, doing it exactly the same way—the supplier of the raw material, the exact amounts, the complete listing of raw materials, the way in which the equipment is handled—this must be done in a consistent fashion, day in and day out. So that it's a combination of all these factors which contribute to the value of such document and which would be of immediate value to someone wishing to start on an equal footing with American Cyanamid in the manufacture of DMCTC, because by having this they would obviate the extensive and time-consuming techical work that went into the preparation of that document.
>
> "Now I am mentioning this with respect to Exhibit 73, but it should equally well apply to the other part of the DMCTC operating instruction which was the fermentation procedure, Exhibit 29."

The testimony of Fox, who wrote up substantial numbers of the "documents" involved herein, made equally clear the imprecision and generality with which he did so (323-4, 363-5, 880), and the lack of value in such "documents" was further confirmed by the unsuccessful results of which

Wawretschek complained, as above noted. Indeed, it appeared that Wawretschek had complained that all he had received were cultures which had come from a public depository and processes which had been taken from public literature (2429).

The eighth count charged the petitioner herein with the unlawful transportation on or about April 16, 1961, from New York to Rome, Italy, of stolen "goods, wares and merchandise, of a value of $5000 and more", consisting of certain microorganisms and "documents relating to the production" thereof. The tenth count charged the petitioner herein with having unlawfully conspired to commit offenses in violation of 18 U.S.C. Secs. 2314 and 2315, involving the unlawful transportation in foreign commerce, and receipt and disposition thereafter, of "stolen goods of a value of $5000 and more", consisting of specified microorganisms and "documents relating to the production" thereof.

Although at first the Government's position appeared to be that those documents were "the Lederle documents detailing the processes to be used to manufacture these drugs", and not intangible "know-how" (94, 903-904), it developed at the trial that of the thousands of pages of documents (including microfilm) put in evidence, none except one of these was a photostat of a "Lederle" document (877). The remainder of the so-called "Lederle documents" put in evidence, consisted in part of write-ups, by Fox, Fine and Cancelarich, in which they included abstracts of such documents and, in substantial part, write-ups in Fox's, Fine's and Cancelarich's own language, based in part upon the Lederle documents and in part upon their own experience.

For example, among the documents admitted in evidence against the defendants on Counts 8 and 10 of the indictment were incomplete, undetailed procedures on triamcinolone written up by Fox, from which "one could develop a good procedure for tramcinolone" (323-324). Fox also "prepared a fermentation procedure for chlortetracycline" (CTC) (363), not the Lederle procedure. Following delivery of that procedure, Fox "clarified" that procedure to Sharff by showing him "what I (Fox) wanted in the procedure" (364-365). It was also shown by the testimony of the Government's "expert" witness, Dr. Scholz (1936), that a scientist such as Dr. Fox, by reason of his extensive training at Lederle and elsewhere would normally be able to retain by memory the critical and economically useful details pertaining to the secret processes used by Lederle in the production of DMCTC, TC, CTC and triamcinolone. His duties at Lederle required him to be aware of the developments in all fields.

Fox thus could, as he apparently did, interpolate extensively into his write-ups, factors derived from his own "know how" in this field. Fox identified Government Exhibits 27 and 28 as procedures prepared by him and Cancelarich (406). He identified Government's Exhibit 29 through 33 as containing abstracts from Lederle documents and written up by him and Cancelarich at Fox's house (407-410). Exhibit 78 was a triamcinolone procedure prepared by Fox "from my own knowledge and also using microfilm (of Lederle reports) which I had available at that time" (880). In addition, the procedures written up by Fox, Fine and Cancelarich were not in the same language as appeared on those documents but in their own

language (e.g., 1055-56). Exhibits 27, 29, 31 and 78 were among the documents carried to Italy by Cancelarich on April 16, 1961 (407-410, 876-876a).

In short, as the Government acknowledged, the thrust of the testimony of the witnesses Fox and Cancelarich, as to the preparation of the procedures they wrote up, was that they took the Lederle documents, read or made photostats or microfilm copies of them at home, and, after reading them, prepared their own procedures and returned the originals (901-902, 1840).

Reasons for Granting the Writ

Petitioner believes this case presents important and novel questions in the administration of the criminal law, particularly in the interpretation of 18 U.S.C. Sec. 2314, which have not been and should be decided by this Court. Moreover, the Court below in determining one of the questions herein presented elected to follow Third Circuit holdings which are in conflict with a Fifth Circuit holding which supports petitioner's contention.

1. The Court below, in holding that the evidence was sufficient to establish that the cultures and documents here involved were of the value of $5,000. or more, held that it was proper to consider evidence of value in a "thieves' market" and the cost of developing the cultures. In doing so, it elected to follow Third Circuit holdings in *United States* v. *Seagraves*, 265 F. 2d 876 (3 Cir. 1959), and *United States* v. *Lester*, 282 F. 2d 750 (3 Cir. 1960), cert. denied 364 U.S. 937 (1961), and rejected a contrary Fifth Circuit holding in *Abbott* v. *United States*, 239 F. 2d 310, 312-313 (5 Cir. 1956).

The statute, 18 U.S.C. Sec. 2314, makes it a federal offense to transport goods across state lines only if they have a "value" of $5,000. or more and 18 U.S.C. Sec. 2311 prescribes the exclusive criteria for such value. In the *Abbott* case, *supra,* involving a prosecution for the unlawful transportation of photostats of geophysical maps, the Fifth Circuit held that the prosecution had failed to establish the essential element of value of $5,000. or more because of its failure to show either a market, or a market value, for the materials involved, as required by 18 U.S.C. Sec. 2311. That court further held that it was error to permit testimony, on the question of value, as to the cost for the geophysical exploratory work represented by the maps "or its 'value' to oil lease traders and promoters working up trades for that area", since even if such evidence served to show "intrinsic or actual value, . . . it was certainly not market value . . ." (239 F. 2d 312). The Court further stated (239 F. 2d 313):

> "Congress plainly restricted value to three well-understood standards. Mere cost of production, cost of replacement, value to the owner, value to one who might have use of it under certain special circumstances, whatever else it might be, is not market value. For that value—market—depends on a market, whether formal or informal, in which willing buyers bargain with willing sellers."

While the Third Circuit held in *United States* v. *Lester, supra,* that "any reasonable method" could be employed to determine the value of an item not having a market value and earlier held in *United States* v. *Seagraves, supra,* that the price paid by the defendants themselves could be thus considered, it is submitted that the holding of the Fifth

Circuit in the *Abbott* case, *supra,* is more in consonance with the language of the governing statute and with reason and should be followed.

The price offered for stolen property in a thieves' market, by a receiver thereof, does not constitute evidence of market value as defined in Section 2311. Testimony that a stolen diamond was sold for $3500. to a fence would, according to the opinion, constitute value in a thieves' market. Thus, if it were the only testimony offered on value, it would bar conviction even though the diamond had a market value of $10,000. On the other hand, a good imitation of a diamond which can be bought in the diamond market for about $500 and which was sold in a thieves' market by misrepresentation as an actual diamond for $5,000, would then sustain a conviction. These examples hardly establish market value as defined in Section 2311, upon which prosecutions may be sustained.

The Court below states (App. A, page 7):

> "Neither do we have any concern over the value of these papers, since we dismiss out of hand the contentions that secret processes for which European drug manufacturers were willing to pay five and six figures and in whose illicit exploitation appellants eagerly invested a large portion of their time and an appreciable amount of their fortunes were not worth the $5,000, required to subject them to federal prosecution. . . ."

There was no competent proof submitted that European drug manufacturers were willing to pay five and six figures for the secret processes. The only testimony on this subject came from Fox and Cancelarich and related to

alleged conversations had with European buyers. These conversations were not in the presence of any of the defendants on trial and were not in furtherance of Count 10, the conspiracy charged herein. These conversations were pure hearsay and inadmissible. Proper objection and motion to strike were made (2166).

The fact that the defendants made a substantial investment in Ankermann also does not constitute proof of the value of the cultures allegedly received by Ankermann from Cancelarich. Cancelarich testified that as far as he knew, the Ankermann deal was perfectly legitimate (1294). There was a failure of proof as to whether the actual cultures stolen from Lederle were transported to Ankermann. Cancelarich testified (844) that the stolen cultures were given to a Dr. Weinstein for "relyophilization". Dr. Weinstein was not called as a witness to prove that the stolen cultures or the lyophilized strains thereof were the ones returned to Cancelarich. There is no proof of what Dr. Weinstein returned to Cancelarich. In fact, Fine testified that he received six different cultures from Weinstein (1499). Further, if the stolen Lederle cultures were good productive ones, then these were not the same as those given to Ankermann. Both Cancelarich and Wawretschek complained that these cultures were failures (688, 1224). What is the value of a culture that is a failure?

2. The Court below, in holding that the transportation of papers describing the Lederle processes constituted the transportation in interstate or foreign commerce of "goods" which had been "stolen, converted or taken by fraud" within the meaning of 18 U.S.C. Sec. 2314, recognized that a "serious question" and "serious point of

law" had been raised (App. A, pp. 6, 7). In holding as it did, the Court below cited no direct authority, nor has diligent research disclosed any such authority. Thus this case presents an important and novel question in the administration of the criminal law which has not and should be decided by this Court.

The Court below acknowledged that there was a "lack of proof that any of the physical materials . . . came from Lederle's possession". It found that the standard procedure was for Fox and Cancelarich to remove documents from Lederle's files at Pearl River, N. Y., take these to Fox's home within New York State, make photocopies, microfilms or notes, and then restore the purloined papers to Lederle's files. It developed at the trial that of the thousands of pages of documents, including microfilm, put in evidence, none except one of these was a Lederle document (877). The remainder of the Lederle documents put in evidence consisted in part of write-ups by Fox, Fine and Cancelarich, on which they included abstracts of such documents and, in substantial part, write-ups in their own language based in part upon the Lederle documents and in part upon their own knowledge and experience. Thus what were transported in interstate and foreign commerce were not documents which were the property of Lederle, having been made in its office, on its paper and with its equipment, as in the *Seagraves* and *Lester* cases, *supra*, but documents prepared by and belonging to Fox, Fine and Cancelarich, and were at most their own copies or summaries of Lederle procedures. It is submitted that even to the extent that these writings contained intangible "trade secrets" or ideas stolen from

Lederle, such intangibles are not within the ambit of "goods, wares and merchandise" as those terms are used in 18 U.S.C. Sec. 2314. The Court below, without citing authority, concluded otherwise.

The Court below conceded that 18 U.S.C. Sec. 2314 "would presumably not extend to a case where a carefully guarded secret formula was memorized, carried away in the recesses of a thievish mind and placed in writing only after a boundary had been crossed". It held, however, that where the "physical form" of that which is stolen is of secondary importance to the matter therein recorded, the transformation of the information in the stolen papers into another tangible object should be deemed immaterial where the latter is transported in interstate or foreign commerce. Thus, if a scientist like Fox each day memorized some particular procedure and each night at home prepared notes therefrom so that he accumulated notes of a complete procedure and transported these notes from New York to New Jersey, a violation of the statute would occur. If, on the other hand, he lived in New Jersey and not New York, and compiled his notes in the same manner, a violation would not occur. It is submitted that this interpretation of the statute offends common sense and reason.

3. In July, 1964, the indictment (64 CR. 648) was returned in the Southern District of New York charging the petitioner, along with eight co-defendants, with various violations of the United States Code. The aforesaid indictment superseded in some respects an indictment returned in October, 1962 in the same District (62 CR. 963). In 1962, John Cancelarich and Leonard Howard Fine pleaded guilty to all counts in the 1962 indictment in which they were

named. In January, 1963, Joseph Gerace pleaded guilty to all counts in which he was named in the 1962 indictment. In October, 1964, Sidney Martin Fox pleaded guilty to all counts in which he was named in the 1964 indictment. None of the four was sentenced until after completion of the trial of the petitioner. On October 1, 1965, prior to the fixing of a trial date, the petitioner moved in the United States District Court for the Southern District of New York for an order directing that sentence be imposed upon Cancelarich, Fine, Gerace, and Fox before the trial of the 1964 indictment or, in the alternative, for an order directing that the testimony of the four men be suppressed and that they be prohibited from testifying on behalf of any party in the trial of the indictment (App. B, p. A-10). Thereafter on November 5, 1965, and before trial, the court denied the motion (App. B, p. A-17). On December 15, 1964, the government marked the sentence of Fox off the calendar and on December 28, 1964, the government marked the sentences of Cancelarich, Gerace and Fine off the calendar (App. B, pp. A-14, 16). The 1964 indictment was moved for trial and the four witnesses not having been sentenced testified on behalf of the Government. It is the contention of the petitioner that the failure to sentence the four above named individuals created a situation wherein the four witnesses were motivated to testify in a manner favorable and satisfactory to the government to obtain the good will of the government upon sentencing.

It is a custom which has existed in this country for a considerable period that the government, in the prosecution of criminal cases, gives consideration to witnesses who have assisted the government. "The witnesses concerned are aware that this is so; the jurors and general public are also

aware of this practice." *U.S.* v. *Aviles*, 274 F. 2d 179, 191 (2nd Cir. 1960).

It is an unfortunate fact that to a certain extent the practice of withholding sentencing is considered to be a necessary adjunct to efficient law enforcement. It is to the government's advantage to keep the sword of sentence hanging over the head of co-defendant witnesses until such time as they have finished testifying against those with whom they allegedly associated in a criminal venture. On the other hand, as time passes the co-defendant witness continues at liberty and commences to pick up the threads of the life which was disrupted by his prosecution and conviction. Is it not likely that such a witness would be prone to do anything which he feels would be reasonably calculated to inspire the gratitude of the U.S. Attorney and other representatives of the government? As time continues to pass, it would seem that such efforts to please might grow to unwarranted proportions. *Rule 32 of the Federal Rules of Criminal Procedure* provides in part, "Sentence shall be imposed without unreasonable delay." The aforesaid Rule has been construed to be pointed not only toward the interest of the prisoner, but toward the interest of society as well. *Pratt* v. *U.S.*, 102 F. 2d 275, 278 (D.C. Cir. 1939); Cf. *Berkowitz* v. *U.S.*, 90 F. 2d 881, 822 (8th Cir. 1937). A determination as to whether or not a delay in completing a prosecution by way of sentence amounts to an unconstitutional deprivation of the rights of the prisoner depends upon the circumstances. *Beavers* v. *Haubert*, 198 U.S. 77, 49 L. Ed. 950, 25 S. Ct. 573. Presumably, what would amount to an unreasonable delay tending to deprive the prisoner of his rights would also constitute an unreasonable delay from the standpoint of the general public.

The United States Supreme Court in the case of *Pollard* v. *U.S.*, 352 U.S. 354, 1 L. Ed. 2d 393, 77 S. Ct. 481 (1957) indicates that the delay must not be "purposeful or oppressive."

In requesting that co-defendant witnesses be sentenced prior to commencement of trial, petitioner sought to avoid an evil which courts have long recognized and over which they have expressed concern. In *People* v. *Hermens*, 5 Ill. 2d 277, 285, 125 N.E. 2d 500, 504 (1955) the Illinois Supreme Court stated with regard to a co-defendant witness:

> "It is . . . universally recognized that such testimony has inherent weaknesses, being testimony of a confessed criminal and fraught with dangers of motives such as malice toward the accused, fear, threats, promises or hopes of leniency, or benefits from the prosecution which must always be taken into consideration . . ."

See also:

Crawford v. *United States*, 212 U.S. 183, 204 (1909);
Outlaw v. *United States*, 81 F. 2d 805 (5th Cir. 1936), cert. denied, 298 U.S. 665 (1936);
Delvalley v. *United States*, 88 F. 2d 579 (7th Cir. 1937);
Hanks v. *United States*, 97 F. 2d (4th Cir. 1938).

The petitioner's request for a fair trial sought to avoid the over-cooperation and over-enthusiasm which co-defendant witness could be expected to offer to the prosecution in return for favorable consideration at sentencing.

4. On October 18, 1966, and simultaneously herewith a petition for a writ of certiorari was filed in behalf of co-defendant Seymour Salb. His petition presents and de-

velops the sole question as to whether it is permissible for a Federal judge to impose a more severe sentence upon a criminal defendant because he has exercised his constitutional right to enter a plea of not guilty and stand trial. Rather than burden this Court with a repetition of the argument made in behalf of Seymour Salb, petitioner herein adopts that argument in further support of the within petition.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

VAN RIPER & BELMONT
Attorneys for Petitioner

SHELDON LOWE
Of Counsel

October 18, 1966

APPENDIX A

Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No: 436—September Term, 1965.

(Argued June 23, 1966 Decided August 4, 1966.)

Docket No. 30343

UNITED STATES OF AMERICA,

Appellee,

—v.—

CAESAR BOTTONE, SEYMOUR SALB, and NATHAN SHARFF,

Appellants.

Before:

MOORE, FRIENDLY and FEINBERG,

Circuit Judges.

Appeals from a judgment of the District Court for the Southern District of New York, Charles M. Metzner, *Judge,* convicting defendants, after a verdict, of interstate and foreign transportation of cultures and documents stolen, converted or taken by fraud in violation of 18 U. S. C. §2314, and of conspiring to do so in violation of 18 U. S. C. §371. Affirmed.

MOSES POLAKOFF, New York, N. Y. (Van Riper & Belmont, Newark, N. J.; Walter D. Van Riper, of Counsel; Theodore M. Wolkof, New York, N. Y., on brief), *for Defendants-Appellants Salb and Sharff.*

ALFRED DONATI, JR. (Zoloto, Karger & Zurkow, New York, N. Y.; Arthur Karger, of Counsel), *for Defendant-Appellant Bottone.*

DANIEL R. MURDOCK (Robert M. Morgenthau, United States Attorney for the Southern District of New York; John S. Martin, Jr., Stephen F. Williams, John E. Sprizzo, Assistant United States Attorneys), *for the United States of America.*

FRIENDLY, *Circuit Judge*:

The convictions here under appeal stem from a scheme for the massive extraction from Lederle Laboratories, a division of American Cyanamid Company located in Pearl River, N. Y., of microorganisms used in the production of three antibiotics and a steroid,[1] and instructions for the drugs' manufacture. Although the drugs were covered by patents and specimen cultures were required to be deposited in collections available for purchase by the public at minimal cost, improved strains of the microorganisms and detailed manufacturing processes developed by Lederle which

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[1] The antibiotics were tetracycline (TC), sold as Achromycin; chlortetracycline (CTC), sold as Aureomycin; and demethychlortetracycline (DMCTC), sold as Declomycin. The steroid was triamcinolone, sold as Aristocort.

were not in the public domain offered vastly greater output from the same physical plant. The combination of this with the lack of patent protection in certain foreign countries created a market for stolen cultures and secret processes and furnished a substantial incentive for theft to disloyal employees and persons willing to do business with them. The enterprise that was the subject of this indictment involved stealing and preserving cultures Lederle had developed, temporarily removing and copying documents that outlined manufacturing procedures, and then selling the cultures and the copies primarily for ultimate exportation to Europe. As in so many criminal trials, the Government's case was presented mainly through the chief culprits, two former Lederle employees, Sidney Fox and John Cancelarich, and their lieutenant, Leonard Fine, all of whom pleaded guilty to the charges against them and were rewarded for their cooperation with light sentences of six months' imprisonment.[2] The serious crimes charged against the appellants, Salb, Sharff and Bottone, were on the receiving end.

The trial was in the District Court for the Southern District of New York before Judge Metzner and a jury. The counts submitted, on which appellants were found guilty and given two-year concurrent sentences, were in summary as follows:

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[2] Joseph Gerace, a lesser accomplice, who also testified for the Govermnent, received a suspended sentence.

Number	*Charge*	*Appellants*
1	Transporting CTC cultures and related documents from Spring Valley, N. Y., to East Paterson, N. J., on November 11, 1959.	Salb Sharff
8	Transporting TC, CTC, DMCTC and triamcinolone cultures and related documents from New York to Rome, Italy, on April 16, 1961.	Bottone Salb Sharff
9	Transporting CTC culture from New York to Milan, Italy, on September 15, 1961.	Bottone Sharff
10	Conspiracy to steal, transport and sell cultures and related documents from March 1958 to July 1964.	Bottone Salb Sharff

Appellants' prolix briefs reargue the evidence in a manner that would scarcely be convincing to a jury and is wholly misplaced before an appellate court. Counsel ought to understand the futility of tedious efforts to show that each piece of testimony is susceptible of an innocent interpretation if it stood alone. The trier is entitled, in fact bound, to consider the evidence as a whole; and, in law as in life, the effect of this generally is much greater than of the sum of the parts. Cf. *United States* v. *Monica*, 295 F. 2d 400, 401-02 (2 Cir. 1961), cert. denied, 368 U. S. 953 (1962). Indeed we find simply frivolous the attempt to

demonstrate insufficiency by Salb and Sharff, who, as proprietors of Biorganic Laboratories of East Paterson, N. J., had begun illicit dealings with Fox in stolen Lederle cultures as early as the winter of 1958, continued their purchases of microorganisms and documents for more than two years, and then switched their custom to Cancelarich after he had acquired most of Fox' collection of Lederle cultures and records. Although Bottone entered the conspiracy at a later stage and the Government adduced no direct testimony that he had heard the cultures and documents described as stolen from Lederle, the evidence of his participation in discussions as to disposition of the goods and of his substantial role in facilitating transportation abroad of both cultures and participants, which we summarize in the margin,[3] amply met the Government's burden. To

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[3] Bottone's first significant appearance was in June 1960 when Sharff and Salb were endeavoring to persuade Fox it would be dangerous for him to sell the stolen materials by himself. They placed a fake advertisement seeking information in a trade paper under the name of a Dr. Angelo Mancuso, with the address of Sharff's brother-in-law. Fox answered the ad and met in London with a business associate of Bottone, Salvetti, who masqueraded as Dr. Mancuso. Salvetti telephoned Bottone who was then in Italy and, saying he had just met with a group that had closed a big deal which he had to stop, asked Bottone to cable him in London that Interpol was investigating the theft of Lederle trade secrets. Bottone sent the cable, left for London in the middle of the night, and secretly observed Salvetti show the cable to Fox. Afterwards Salvetti told Bottone he wanted to stop Fox' deal so that he might offer the same information and microorganisms at a lower price. In March 1961 Bottone had a visit in Berlin with Wawretschek, head of a Milan pharmaceutical firm, Ankermann, which had been a purchaser of the stolen cultures and processes; Wawretschek complained about the quality of the microorgansims and suggested a new deal whereby Salb, Sharff, Salvetti and Bottone would buy into his company. Bottone telephoned this proposal to Salvetti in Rome; on April 10 the American group executed a purchase contract in New Jersey, with Salvetti signing in Bottone's behalf. On April 14 Fine and Salvetti drove Cancelarich from Salvetti's apartment in Bronxville, N. Y., to Biorganic to discuss Cancelarich's employment at Ankermann with Salb, Sharff and Bot-

hold that the jury could not be convinced from all this evidence of his comings and goings that Bottone knew what was about, would require a greater degree of credulity than even such "naif, simple-minded men" as appellate judges, see Holmes, Collected Legal Papers 295 (1920), can be expected to possess. And we are wholly unimpressed by the criticisms now made of the judge's summary of this evidence, to which counsel took no exception at the time. See *United States* v. *Kahaner*, 317 F. 2d 459, 478-79, 482 (2 Cir.), cert. denied, 375 U. S. 836 (1963).

The only serious point of law raised by appellants is whether the transportation of papers describing the Lederle processes constituted the transportation in interstate or foreign commerce of "any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converetd or taken by fraud."

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tone. Cancelarich made a full revelation of his own thieveries and his possession of Fox' collection of Lederle cultures and processes, but it was not proved that this was heard by Bottone, who arrived late. Two days later Bottone drove Cancelarich from Fort Lee, N. J., to Kennedy Airport and bought him a ticket to Italy; Cancelarich carried stolen cultures and papers describing Lederle's processes. Bottone subsequently flew to Milan and in May introduced Cancelarich to a Dr. Marpurgo, representing a Milan firm called MIBA, who was interested in buying a DMCTC process. Cancelarich promised to furnish this for $60,000, which he agreed to split with Bottone who said he would split his share with Salvetti. The culture and processes furnished MIBA were stolen from Lederle. Somewhat later Bottone drove Fine, equipped with stolen Lederle cultures and documents destined for Ankermann, from New Jersey to Kennedy Airport and bought him a ticket to Italy. Fine and Marpurgo subsequently reported to Bottone's MIBA's success with the processes supplied by Cancelarich. In July Bottone financed a trip to Italy for Fine whom he asked to collect $2,000 of his share from Marpurgo. Finally, in September 1961 Bottone, at Sharff's request, took a CTC culture from New York to Milan for delivery to Wawretschek, telling him that the package contained strains coming from Fine.

18 U. S. C. §2314. The problem is not any doubt on our part that papers describing manufacturing procedures are goods, wares, or merchandise, as was held with respect to geophysical maps in *United States* v. *Seagraves*, 265 F. 2d 876 (3 Cir. 1959), and *United States* v. *Lester*, 282 F. 2d 750 (3 Cir. 1960), cert. denied, 364 U. S. 957 (1961). Neither do we have any concern over the value of these papers, since we dismiss out of hand the contentions that secret processes for which European drug manufacturers were willing to pay five and six figures and in whose illicit exploitation appellants eagerly invested a large portion of their time and an appreciable amount of their fortunes were not worth the $5,000 required to subject them to federal prosecution, see *United States* v. *Schaffer*, 266 F. 2d 435, 440 (2 Cir. 1959), aff'd, 362 U. S. 511 (1960), or that the judge committed any prejudicial error in his submission of that issue to the jury. If *Abbott* v. *United States*, 239 F. 2d 310, 312-13 (5 Cir. 1956) is to be considered as ruling out evidence of value in a thieves' market, we prefer the contrary Third Circuit holdings in *United States* v. *Seagraves, supra*, 265 F. 2d at 880, and *United States* v. *Lester, supra*, 282 F. 2d at 754-55. The serious question is whether, on the facts of this case, the papers showing Lederle processes that were transported in interstate or foreign commerce were "goods" which had been "stolen, converted or taken by fraud" in view of the lack of proof that any of the physical materials so transported came from Lederle's possession. The standard procedure was for Fox and Cancelarich to remove documents from Lederle's files at Pearl River, N. Y., take these to Fox' home within New York state, make photocopies, microfilms or

notes, and then restore the purloined papers to the files; only the copies and notes moved or were intended to move in interstate or foreign commerce. The case differs in this respect from the Third Circuit cases of *Seagraves* and *Lester* where, as the records on appeal show, the photostats and tracings delivered by the Gulf Oil geologist were the property of the company, having been made in the company's office, on its paper and with its equipment.

We are not persuaded, however, that a different result should obtain simply because the intangible information that was the purpose of the theft was transformed and embodied in a different physical object. To be sure, where no tangible objects were ever taken or transported, a court would be hard pressed to conclude that "goods" had been stolen and transported within the meaning of §2314; the statute would presumably not extend to the case where a carefully guarded secret formula was memorized, carried away in the recesses of a thievish mind and placed in writing only after a boundary had been crossed. The situation, however, is quite different where tangible goods are stolen and transported and the only obstacle to condemnation is a clever intermediate transcription or use of a photocopy machine. In such a case, when the physical form of the stolen goods is secondary in every respect to the matter recorded in them, the transformation of the information in the stolen papers into a tangible object never possessed by the original owner should be deemed immaterial. It would offend common sense to hold that these defendants fall outside the statute simply because, in efforts to avoid detection, their confederates were at pains to restore the

original papers to Lederle's files and transport only copies or notes, although an oversight would have brought them within it. We have been instructed to "free our minds from the notion that criminal statutes must be construed by some artificial and conventional rule." *United States* v. *Dege*, 364 U. S. 51, 52 (1960) (Frankfurter, *J.*), quoting *United States* v. *Union Supply Co.*, 215 U. S. 50, 55 (1909) (Holmes, *J.*). See also *United States* v. *Sullivan*, 332 U. S. 689, 693-94 (1948); *United States* v. *Bramblett*, 348 U. S. 503, 509-10 (1955); *United States* v. *Turley*, 352 U. S. 407, 412-13 (1957). Such considerations have particular force when, as here, the defendants could not have doubted the criminal nature of their conduct, and the sole issue is whether they subjected themselves to punishment by the United States as well as by a state.

Alternatively, we accept the Government's suggestion that the judgment may stand even if the statute does not reach far enough to include the copies and notes. Each count included and the evidence showed the transportation of cultures which were stolen "goods" on any view. The problem whether the copies and notes of Lederle documents were also within the statute arises only because substantive counts 1 and 8 and conspiracy count 10 charged the transportation both of cultures and of documents and the jury made no finding that the cultures alone were worth $5,000, although it would have been quite justified in doing so. But, says the Government, count 9 charged only transportation of a stolen CTC culture which the jury necessarily found worth the statutory minimum in convicting Sharff and Bottone and in view of the concurrent sentences we need not go further as to them. And Salb's conviction

should also stand since the transportation of the culture charged in count 9 was in furtherance of the conspiracy alleged in count 10 and the journey was one of the overt acts. In accepting this argument here we would not wish to be understood as giving all-out obeisance to the validation of concurrent sentences by the presence of one or more good counts, see *Lawn* v. *United States*, 355 U. S. 339, 359-62 (1958); despite frequent reliance on this principle where appropriate, we adhere to Judge Clark's statement that we will reverse for a material error on another count "whenever the nature of the error committed below or other circumstances suggest that the accused might have received a longer sentence than otherwise would have been imposed, or that he has been prejudiced by the results of the proceedings." *United States* v. *Hines*, 256 F. 2d 561, 563 (2 Cir. 1958); cf. *United States* v. *Barash*, —— F. 2d ——, —— (2 Cir. 1966). But this is not such a case. The error —if there was one—went only to including the papers in the determination of value under counts 1, 8 and, by reference, the conspiracy count, and, as said in *United States* v. *Schaffer, supra*, 266 F. 2d at 440:

> "The only reason for the $5,000 limitation is to avoid overtaxing the Department of Justice. There is no legitimate interest of [defendants] . . . which the Congress sought to protect by this requirement."

We have not the slightest question that the jury would have properly convicted on all counts if only the transportation of cultures had been charged, and the papers had been relied on simply as demonstrating the scope of the criminal enterprise and as enhancing the value of the microorgan-

isms. Judge Metzner's remarks on imposing sentence show that he viewed defendants' activities as a whole, and the two-year concurrent sentences were modest as compared to the permitted maximum of ten years imprisonment, a $10,000 fine, or both, on each substantive count, 18 U. S. C. §2314, or the five years imprisonment, $10,000 fine or both, on the conspiracy count, 18 U. S. C. §371.

The only other point meriting discussion, and that somewhat questionably, is Bottone's objection to the Government's being allowed to use a deposition and a memorandum of further interrogatoin in a civil action. Merck & Co. had obtained a consent judgment of $100,000 in the District Court for New Jersey against Bottone for infringement of its patent on Vitamin B-12. In May 1962 it entered into an agreement, amended a month later, whereby it would accept $15,000 in satisfaction of the judgment if Bottone would give a "frank and complete disclosure in depositions under oath of all matters and things" within his knowledge on a specified list of subjects. Bottone claims that government investigation had "focused" upon him before the bulk of the interrogation, see *Escobedo* v. *Illinois*, 378 U. S. 478, 490 (1964), that his answers were extracted by pressure and subterfuge on the part of Merck's New Jersey attorney who also represented American Cyanamid in that state, and that much of the interrogation was conducted without Bottone's counsel being present. Therefore, he insists, use of his answers at trial should have been barred as in violation of Fifth and Sixth Amendment rights, or that at least he should have been given a hearing to prove that Merck's lawyer was acting in part at the Government's behest.

Putting to one side the Government's substantial claims that these points were not sufficiently raised below, we find them wholly without merit. In no conceivable way was Bottone "compelled . . . to be a witness against himself." He freely consented to the interrogation, for his own benefit, to rid himself of a liability for $85,000; if the questioning touched on matters tending to incriminate him, he was free to claim the privilege on penalty only of foregoing the financial advantages that performing his agreement to talk would entail. Since he was not in custody, the rules laid down in *Miranda* v. *Arizona*, —— U. S. —— (1966), have no application even if Merck's attorney were working with the Government—quite apart from this having been a pre-*Miranda* trial. See *Johnson* v. *New Jersey*, —— U. S. —— (1966). In any event, not only is it fairly inferable that Bottone had the advice of counsel when he signed the agreement with Merck but a lawyer was present during half the civil interrogation and there was nothing to prevent one from assisting throughout if Bottone had wished. Moreover, in contrast to *Massiah* v. *United States*, 377 U. S. 201 (1964), no "criminal prosecution" against Bottone had been commenced at the time of the questioning, and *Miranda* appears to teach that the references in *Escobedo* v. *Illinois, supra*, to the need for counsel in the period prior to initiation of the criminal process were solely concerned with the need for a lawyer to counteract the coercion thought to be inherent in in-custody interrogation.

Affirmed.

APPENDIX B

Docket Entries

(A) CRIMINAL DOCKET

UNITED STATES DISTRICT COURT

62 Cr 963

THE UNITED STATES

vs.

1. SIDNEY MARTIN FOX—Cts. 1, 2, 3, & 5
2. ELIO SALVETTI—Cts. 1, 2, 3, 4 & 5
3. NICOLO VISCONTI diMADRONE—Cts. 1 & 5
4. NATHAN SHARFF—Cts. 4 & 5
5. CAESAR BOTTONE—Cts. 4 & 5
6. JOSEPH GERACE—Cts. 4 & 5
7. JOHN CANCELARICH—Cts. 1, 2, 3, 4 & 5
8. LEONARD HOWARD FINE—Cts. 1, 2, 3, 4 & 5

T. 18, Secs. 2314 & 2, U.S. Code.
Unlawfully transporting foreign commerce drug and valued at $5,000., and more, knowing the same to have been stolen.
(Cts. 1 to 4, inclusive.)

T. 18, Sec. 371, U.S. Code
Conspiracy so to do.
(Total—Five Counts)

* * * * *

Docket Entries

DATE	PROCEEDINGS
12-28-64	John Cancelarich Leonard Howard Fine Joseph Gerace Case Marked Off Calendar. Tyler, J.

• • • • •

Docket Entries

(A) UNITED STATES DISTRICT COURT

CRIMINAL DOCKET

64 Cr 648

THE UNITED STATES

vs.

Caesar Bottone—Cts. 8, 9 & 10

John Cancelarich—Cts. 6 & 8

Leonard Fine—Cts. 6 & 8

Sidney Martin Fox—Cts. 1, 2, 3, 4, 5, 6, 7, 10 & 11

Maurice Rosenblatt—Cts. 2 & 3

Seymour Salb—Cts. 1, 8, 9 & 10

Elio Salvetti—Cts. 4, 5, 6, 7, 8, 9 & 10

Nathan Sharff—Cts. 1, 8, 9 & 10

Nicolo Visconti diMadrone—Cts. 4, 5 & 7

T. 18, Secs. 2314 & 2, U.S. Code

Unlawfully transporting & causing to be transported in interstate commerce (Cts. 1 & 11) and in foreign commerce (Cts. 2, 4, 5, 6, 8 & 9) drugs of a value of $5,000., and more & documents relating to the production of said drugs, knowing the same to have been stolen, converted & taken by fraud.

Docket Entries

T. 18, Sec. 371, U.S. Code.

Unlawfully conspiring to violate Sections 2314 & 2315, Title 18, U.S. Code. (Cts. 3, 7 & 10).

(Total—Eleven Counts)

• • • • •

DATE	PROCEEDINGS
(B)	
12-15-65	Sidney Martin Fox—Case marked off calendar. Tyler, J.
10-1-65	Nathan Sharff) Seymour Salb)—Filed notice of motion for an order directing that sent. be imposed upon John Cancelarich, Leonard Fine, Joseph Gerace, and Sidney Martin Fox forthwith & before the trial of the indictment herein, or, in the alternative, an Order directing that testimony of Cancelarich, Fine, Gerace & Fox be suppressed & that the said individual be prohibited from testifying on behalf of the Gov't or any deft. in the trial of the indictment herein.

• • • • •

11-9-65	Nathan Sharff) Seymour Salb)—Filed Memorandum #31791—Cannella, D.J.—"Motion by defendants Sharff and Salb, to compel the court to impose sentence on co-defendants Cancelarich, Fine, Ger-

DATE	PROCEEDINGS
	ace and Fox, before trial of indictment herein, or in the alternative that said co-defendants be prohibited from testifying on behalf of the government or any defendant at the trial and that their testimony be suppressed, is denied. * * * So ordered. 11/5/65 Cannella, D.J." (See Memorandum and Order) (Mailed notice on 11/10/65)
	* * * * *

APPENDIX C

Judgment of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the fourth day of August one thousand nine hundred and sixty-six.

Present:

HON. LEONARD P. MOORE,
HON. HENRY J. FRIENDLY,
HON. WILFRED FEINBERG,

Circuit Judges.

United States of America,

Plaintiff-Appellee,

v.

Caesar Bottone, Seymour Salb and Nathan Sharff,

Defendants-Appellants,

John Cancelarich, Leonard Fine, Sidney Martin Fox, Maurice Rosenblatt, Elio Salvetti, and Nicolo Visconti di Madrone,

Defendants.

Appeal from the United States District Court for the Southern District of New York.

Appendix C—Judgment of the United States Court of Appeals

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

By /s/ VINCENT A. CARLIN
Chief Deputy Clerk

APPENDIX D

Order Denying Petition for Rehearing, etc.

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twentieth day of September, one thousand nine hundred and sixty-six.

Present:

HON. LEONARD P. MOORE,
HON. HENRY J. FRIENDLY,
HON. WILFRED FEINBERG,
Circuit Judges.

United States of America,

Plaintiff-Appellee,

v.

Cäesar Bottone, Seymour Salb and Nathan Sharff,

Defendants-Appellants,

John Cancelarich, Leonard Fine, Sidney Martin Fox, Maurice Rosenblatt, Elio Salvetti, and Nicolo Visconti diMadrone,

Defendants.

A petition for a rehearing together with a motion to stay the issuance of the mandate pending a petition for writ of

certiorari to the Supreme Court of the United States having been filed herein by counsel for the appellants Seymour Salb and Nathan Sharff,

Upon consideration thereof, it is

Ordered that said petition for rehearing be and it hereby is denied.

Further ordered that the issuance of the mandate be and it hereby is stayed subject to Rule 28(c) of the rules of this court.

/s/ A. Daniel Fusaro
Clerk

APPENDIX E

Order Denying Petition for Rehearing In Banc

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twentieth day of September, one thousand nine hundred and sixty-six.

Present:

HON. STERRY R. WATERMAN,
HON. LEONARD P. MOORE,
HON. HENRY J. FRIENDLY,
HON. J. JOSEPH SMITH,
HON. IRVING R. KAUFMAN,
HON. PAUL R. HAYS,
HON. ROBERT P. ANDERSON,
HON. WILFRED FEINBERG,

Circuit Judges.

United States of America,

Plaintiff-Appellee,

v.

Caesar Bottone, Seymour Salb and Nathan Sharff,

Defendants-Appellants,

John Cancelarich, Leonard Fine, Sidney Martin Fox, Maurice Rosenblatt, Elio Salvetti, and Nicolo Visconti diMadrone,

Defendants.

Appendix E—Order Denying Petition for Rehearing In Banc

A petition for a rehearing in banc having been filed herein by counsel for the appellants Seymour Salb and Nathan Sharff,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

/s/ A. Daniel Fusaro
Clerk

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CITATIONS

Cases:

Abbott v. *United States*, 239 F. 2d 310 — 9

Lawn v. *United States*, 355 U.S. 339 — 7, 13

Tippett v. *United States*, 353 F. 2d 335, certiorari denied, 383 U.S. 908 — 9

United States v. *Lester*, 282 F. 2d 750, certiorari denied, 364 U.S. 937 — 8

United States v. *Seagraves*, 265 F. 2d 876 — 6

United States v. *Wiley*, 278 F. 2d 500 — 12

Statute:

18 U.S.C. 2314 — 2, 6, 7, 8

Miscellaneous:

S. Rep. No. 538, 73d Cong., 2d Sess., p. 1 — 6

288-345—66——1

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 697

CAESAR BOTTONE, PETITIONER

v.

UNITED STATES OF AMERICA

No. 698

SEYMOUR SALB, PETITIONER

v.

UNITED STATES OF AMERICA

No. 699

NATHAN SHARFF, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is reported at 365 F. 2d 389.

JURISDICTION

The judgment of the court of appeals was entered on August 4, 1966. Petitions for rehearing were denied on September 20, 1966. The petitions for writs of certiorari were filed on October 18, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether papers outlining manufacturing processes are included within the statute (18 U.S.C. 2314, 2315) punishing the interstate transportation of stolen "goods".

2. Whether there was sufficient evidence to show that the goods transported had a value of at least $5,000 and whether the jury was properly instructed on this element.

3. Whether the evidence was sufficient to support the conviction of petitioner Bottone.

4. Whether the government was properly allowed to use a deposition and memoranda of statements made by petitioner Bottone in a civil action.

5. Whether the trial court sentenced petitioners properly.

6. Whether the trial judge could properly delay the sentencing of petitioner's codefendants.

STATUTE INVOLVED

18 U.S.C. 2314 provides in pertinent part:

> Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more,

knowing the same to have been stolen, converted or taken by fraud; * * *.

* * * * * *

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

STATEMENT

Petitioners and others were convicted in the United States District Court for the Southern District of New York of conspiring to steal and transport stolen drug cultures and documents of a value of more than $5,000 (count 10). Each was also convicted of substantive offenses, including count 8, charging transportation of cultures and documents on April 16, 1961, and count 9, charging transportation of cultures alone on September 15, 1961.[1] On January 20, 1966, each was sentenced to imprisonment for two years on each count upon which he was convicted, the sentences to run concurrently.

The existence of a scheme to steal from the Lederle Laboratories microorganisms used in the production of three antibiotics and a steroid, and instructions for their manufacture, is not challenged here, although petitioner Bottone claims the evidence failed to show that he had guilty knowldege. Briefly, the evidence shows that in early 1958, petitioners Sharff and Salb, partners in Biorganic Laboratories, agreed to pay Sidney Fox, a Lederle chemist, $10 per gram for all the tetracycline (TC) that he could steal from his

[1] Petitioners Sharff and Salb were also convicted on count 1 charging the interstate transportation of drugs and cultures on November 11, 1959.

company. During the next six months, Fox delivered stolen TC to Biorganic (R. 301–313), and, subsequently, the microorganisms and written procedures necessary for the production of TC (R. 320–330). Petitioner Bottone, the owner of Pan-Med Pharmaceutical in New Jersey, sold the TC in Italy on behalf of Biorganic at $12 per gram (R. 415–416). Fox also stole a newly discovered antibiotic, demethychlortetracycline (DMTC), and delivered it to Sharff (R. 313–317).

Prior to Fox's resignation from Lederle in September 1959, Sharff and Salb inquired whether he had sufficient Lederle cultures and documents for future use (R. 359–360). In November 1959, Fox was paid $5000 for delivering to Salb a chlortetracycline (CTC) culture and a procedure abstracted from Lederle reports (R. 361–366). Fox subsequently attempted to sell stolen Lederle cultures and processes to firms other than Biorganic (R. 370–376), and Sharff and Salb unsuccessfully attempted to obtain such materials from another Lederle employee (R. 774–782).

In the summer of 1960, Fox, with John Cancelarich, a Lederle chemical engineer, and Leonard Fine, joined together in a business whose primary purpose was the theft and sale of Lederle products to foreign drug firms (R. 389–391, 562–563, 829–831). Cancelarich brought Lederle documents containing its current procedures for preparing the three antibiotics to Fox. The papers were then copied, either by photocopy, microfilm or typewriter (R. 389–394, 834–843). Cancelarich also brought Fox stolen samples

of Lederle's current DMTC and CTC cultures (R. 833–843). At the end of 1960, Fox turned over his collection of stolen Lederle cultures to Cancelarich and his stolen documents to Fine (R. 404, 410, 843).

In April 14, 1960, Cancelarich and Fine met with a group consisting of petitioners and Elio Salvetti, who was about to purchase an interest in Ankermann Italiana, an Italian drug firm. Cancelarich told them he had now had possession of the documents and cultures that Fox and he had taken from Lederle (R. 675–681, 860, 1174–1175).[2] As a result of the meeting, Sharff and Salb agreed to hire Cancelarich to work for Ankermann. Two days later, when Cancelarich carried an attaché case containing stolen Lederle cultures and documents to an airport bound for Italy, Bottone drove him there and bought his ticket. At the end of May, Bottone also took Fine to the airport and supplied him with a ticket to Italy. At that time, Fine informed Bottone that he was carrying antibiotic cultures and other items to Cancelarich in Italy (R. 1511–1515).[3]

---

[2] The court of appeals found that it was not proved that Bottone was present at the April 14 meeting when Cancelarich spoke about the stolen collection. Cancelarich testified that Bottone was present at this meeting when he told the participants that he had access to the latest Lederle production cultures (R. 859–860). On the other hand, Fine said he did not know when Bottone joined the meeting (R. 1507).

[3] Bottone had previously introduced Cancelarich to a representative of another Italian drug firm which agreed to buy a DMCTC culture and document for $50,000. Bottone and Cancelarich agreed to divide this amount (R. 873–876). Bottone sent this firm an empty Lederle package carton for DMCTC (R. 1516–1521).

In September 1961, Bottone carried CTC cultures from New York to Helmuth Wawretschek at the Ankermann plant in Italy. He told Wawretschek that the cultures were from Sharff (R. 695). Wawretschek testified on direct examination that Bottone had told him the package contained strains which had come from Fine (R. 695–696).[4]

ARGUMENT

1. The documents, describing Lederle's manufacturing processes, that were transported in interstate and foreign commerce were not original papers but copies made by Fox and Cancelarich; and petitioners argue (No. 697, Pet. 24–30; No. 699, Pet. 12–14) that copies are excluded from the coverage of the statute. However, an examination of the statute and its history makes clear that "goods" includes photocopies, microfilms and other copies of stolen papers.

(*a*) Section 2314 of Title 18 (*supra*, p. 2) makes it a crime to transport in interstate or foreign commerce "any goods, wares, merchandise, securities or money," of the value of $5,000 or more, knowing them to have been stolen, converted or taken by fraud. The purpose of the statute was to extend the motor-vehicle theft act "to all goods, wares or merchandise" of the value specified (S. Rep. No. 538, 73d Cong., 2d Sess., p. 1), including papers (see *United States* v. *Seagraves*, 265 F. 2d 876 (C.A. 3)). This purpose would be defeated by a construction that excluded

[4] Petitioner Bottone contends that Cancelarich disavowed this testimony on cross-examination, but we do not so read his testimony (R. 746–750).

copies of stolen papers, since what is valuable is the information on the paper, not the physical document. As the court of appeals pointed out (No. 697, Pet. App. A 8):

> * * * [W]hen the physical form of the stolen goods is secondary in every respect to the matter recorded in them, the transformation of the information in the stolen papers into a tangible object never possessed by the original owner should be deemed immaterial. It would offend common sense to hold that these defendants fall outside the statute simply because, in efforts to avoid detection, their confederates were at pains to restore the original papers to Lederle's files and transport only copies or notes, although an oversight would have brought them within it.

(*b*) As the court of appeals also noted, since petitioners received concurrent sentences under counts 9 and 10, their convictions are valid even if Section 2314 does not reach documentary copies. See *Lawn* v. *United States*, 355 U.S. 339.[5]

2. In seeking to prove that the stolen goods had a value of more than $5,000, the government showed that in April 1960 Ankermann Italiana had agreed to pay Shariff and Salb $240,000 for TC, DMCTC and CTC microorganisms and procedures (R. 669–673) and that a Milan pharmaceutical firm had agreed to pay Bottone and Cancelarich $50,000 for the Lederle DMCTC culture and procedure (R. 873–876). There was other evidence of payments for Lederle cultures

[5] Count 9 charged the transportation of cultures only.

substantially in excess of the jurisdictional amount (R. 366–376, 401–403, 429–430, 840–841); proof of Lederle's costs in developing its antibiotic (Ex. 178); and expert testimony that the information in one of the documents "could be of immediate value to someone wishing to start on an equal footing with American Cyanamid in the manufacture of DMCTC" (R. 1803–1804). The court instructed (R. 2793–2794):

> You may determine the value of these goods under each count based on money that was paid for these goods at or about the date of the alleged commission of the crime, whether they were transactions involving the very articles charged in the indictment or similar transactions involving the same. You may also consider agreements that may have been made for the sale of such cultures or documents, even though they were not consummated. And finally, you may consider the cost to American Cyanamid for the development of the various organisms and the documents detailing the manufacturing procedures. In this connection, you may take into consideration the secrecy attendant upon this work and desires of other people to obtain the results of this work.

This instruction provided the jury a reasonable method for determining the value of the stolen items. See *United States* v. *Lester*, 282 F. 2d 750, 755 (C.A. 3), certiorari denied, 364 U.S. 937. Petitioners did not except to this instruction, and we submit that their contention that the government's evidence was insufficient to prove the $5,000 amount required by 18 U.S.C. 2314 (No. 699, Pet. 9–12; No. 697, Pet. 42–44,

50–54) is without substance. *Abbott* v. *United States*, 239 F. 2d 310 (C.A. 5), does not support petitioners. [redacted] It held merely that the proof of value was not sufficient because the "government never established either that there was a market for the sale, purchase, and trade in prints of geophysical maps or a market value" (239 F. 2d at 312). Here the existence of a market was amply shown. Nor is it material whether the stolen cultures were viable and productive at the time of transportation. The value specified by the statute is determined as of the time and place of theft, rather than of receipt or transportation. *Tippett* v. *United States*, 353 F. 2d 335 (C.A. 4), certiorari denied, 383 U.S. 908.

3. Petitioner Bottone's challenge to the sufficiency of the evidence does not raise a substantial issue (No. 697, Pet. 46–50). As the court below found, the total circumstances of his participation—the cable he sent when Biorganic was trying to stop Fox from selling the stolen materials independently (R. 380–384), his participation in Ankermann Italiana, his sale of the culture and documents to MIBA, his transportation of Cancelarich and Fine to the airport when they were carrying stolen materials, his own trip to Italy with a CTC culture—supported an inference of guilty knowledge.

4. The government in its case in chief used portions of a lengthy deposition taken from petitioner Bottone in a civil action brought against him by Merck & Company (R. 2110–2125). It also cross-examined Bottone on the basis of statements (labeled

"memoranda", but transcribed in the same manner as depositions (R. 2366–2367)) made after Bottone had permitted a consent judgment to be entered against him by Merck. In order to reduce the size of the money judgment, Bottone had agreed to make a complete disclosure to Merck about specific subjects (R. 2406–2417). Bottone's lawyer was present at some but not all of the sessions when the statements were taken (R. 2415). Counsel who examined Bottone was a member of the law firm which also represented American Cyanamid, the present owner of Lederle (R. 2405). On cross-examination of Bottone by counsel for petitioner Salb, the court refused to allow questions as to whether counsel for Merck had tried to induce Bottone to obtain evidence against Biorganic (R. 2419–2422). At the trial, petitioner objected to the use of the deposition on the ground that he had been compelled to incriminate himself, the deposition having been given under subpoena, and that the statements made therein were not admissions (R. 2003–2004, 2008–2008a). He objected to the "memoranda" on the ground that he had not been represented by counsel (R. 2366–2368).

Petitioner Bottone argues in effect (Pet. No. 697, pp. 31–37) that all of the statements in these various documents were inadmissible, on the ground (not urged at the trial level) that it is an inescapable inference that the attorney for Merck was surreptitiously acting as an agent for the government after the investigation had focused on petitioner. No such inference is in fact justified. There is no indication whatsoever that in proceeding civilly against peti-

tioner, and in questioning him in connection with that proceeding, Merck and its attorneys had any purpose other than to protect the firm's private interests.

5. The record does not support the contention that petitioners received harsher sentences because they pleaded not guilty and stood trial (Pet. No. 698). The trial court first considered the sentences of the three petitioners. After hearing the pleas of counsel and after allocution, the court addressed petitioners as follows (R. 2873):

> You were there to move it on its way and in some instances even encouraged the other defendants who pleaded guilty to engage in the acts that they were engaged in.
>
> I think I have to be a Solomon to distinguish between the culpability of the three defendants to whom I am now talking, Mr. Sharff, obviously you were the head of this. Your manipulations were like somebody moving chessmen around a board. The string of exhibits and correspondence between you and Cancelarich show that.
>
> Mr. Salb, you were part and parcel of it and you knew that it was going on, and so did you, Dr. Bottone, and that midnight ride from Milan to London is one of the unexplained acts in this case.

The Court then sentenced each of petitioners to imprisonment for two years, noting that society had a right to be protected from them and from "others of like mind and like intelligence who may engage in this type of activity" (R. 2873–2874).

The court then considered the sentences to be imposed on the defendants who had pleaded guilty,

Sidney Fox, John Cancelarich, Leonard Fine and Joseph Gerace. The government told the court that each of them had cooperated with the government, pointing out that the government would not have heard of the crimes except for the information furnished by Gerace (R. 2876–2877, 2822, 2886–2887, 2891). Their lawyers argued that they should not be imprisoned because they had already been punished sufficiently (R. 2879, 2886, 2890). The court imposed a suspended sentence on Gerace because he had volunteered information and because he had had only a small role in the conspiracy (R. 2896–2897). The court rejected the pleas for probation on behalf of the others, saying in part: "Pleas are always made for leniency where defendants plead guilty and cooperate with the government" (R. 2897). The court then imposed sentences of six months' imprisonment.

On this record, which shows that the court considered the three petitioners the tempters and the ringleaders,* there is no reason for review of the trial court's exercise of discretion with respect to the sentences imposed. This case is not like *United States v. Wiley*, 278 F. 2d 500, 504 (C.A. 7), where the court of appeals found "that the punishment imposed * * * was in part for the fact that he had availed himself of his right to a trial, and only in part for the crime for which he was indicted." Wiley, a minor defend-

*It is true that the court of appeals called Fox and Cancelarich "the chief culprits," but that was a reference to their role as the principal actors in the actual thefts from Lederle, rather than a suggestion that they were the kingpins in the conspiracy. This is clear from the court's subsequent statement that the "serious crimes charged against the appellants, Salb, Sharff, and Bottone were on the receiving end."

ant without a criminal record, had been sentenced to three years' imprisonment while the ringleader with a prior record received a sentence of only two years.

6. The contention that petitioners were denied a fair trial because imposition of the sentences of petitioners' codefendants was delayed until the conclusion of petitioners' trial (No. 699, Pet. 14–17) was not raised in the court of appeals. It is, therefore, not reviewable by this Court in the absence of exceptional circumstances. See *Lawn* v. *United States*, 355 U.S. 339, 362, n. 16. There are none here. If petitioners believed that any testimony was motivated by hope for leniency in sentencing, their remedy was to argue this theory to the jury. In the absence of a valid complaint on the part of a person whose sentencing has been delayed, the trial judge could properly await the final disposition of the case before imposing sentence so that he could weigh the culpability of each defendant in light of the full development of the facts at the trial.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petitions for writs of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.
FRED M. VINSON, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
SIDNEY M. GLAZER,
Attorneys.

NOVEMBER 1966.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 698

SEYMOUR SALB,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF BY PETITIONER FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MOSES POLAKOFF
Counsel for Petitioner
475 Fifth Avenue
New York, New York

ALAN M. DERSHOWITZ
GRACE POLK STERN
of Counsel

Langdell Hall
Cambridge 38, Massachusetts

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IN THE

Supreme Court of the United States

October Term, 1966

No. 698

SEYMOUR SALB,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF BY PETITIONER FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

Salb's petition for certiorari raised the single important question: "Whether it is permissible for a federal judge to impose a more severe sentence upon a criminal defendant because the defendant has exercised his Constitutional right to plead not guilty and stand trial" (p. 2). The Government's brief in opposition purports to respond to a very different question: Whether this Court should engage in a "review of the trial court's *exercise of discretion* with respect to the sentence imposed" (brief in opposition at p. 12, emphasis added).[1] Salb took great pains, in his petition, to point out that he is not asking this Court to review the trial court's *exercise of sentencing discretion* (petition

[1] In its statement of the questions presented, the Government puts the issue in yet another, and equally misleading, way: "Whether the trial court sentenced petitioners properly" (brief in opposition at p. 2).

at pp. 6-7); he is asking this Court to decide whether the challenged criterion—the defendant's assertion of his Constitutional right to plead not guilty and stand trial—may properly be considered by a trial judge in the exercise of his sentencing discretion.[2]

Because of its mischaracterization of the question raised by Salb's petition, the Government has not addressed itself to the propriety of the challenged practice.[3] Nor has it responded to Salb's carefully documented demonstration that the harsher sentence imposed on him than on the "chief culprits" cannot possibly be explained on the basis of differences in remorse, culpability, or the need for deterrence (see Salbo's petition at pp. 3-5, 20-23). It has contented itself with resorting to the same gross response to which many courts have resorted whenever a challenge to this practice is mounted: that the "record does not support the contention . . . ." But the Government does not suggest a single explanation for the 400 per cent harsher sentence imposed on Salb than on the "chief culprits."[4]

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[2] Indeed, Salb specifically stated in his petition that he was *not* asking this Court "to impose a new sentence." He asked that the case be "remanded to the District Court with instructions to resentence petitioner giving no weight to the fact that he asserted his Constitutional rights" (petition at p. 7).

[3] This is particularly surprising in light of the Supreme Court's obvious interest in this issue as reflected by its unusual action in *Johnson* v. *United States*, 382 U.S. 923 (1965) (Salb's petition at p. 10), and also in light of the Solicitor General's apparent condemnation of the challenged practice in his response in that case. (*Ibid.*)

[4] It does say, rather lamely, that the chief culprits' "lawyers argued that they should not be imprisoned because they had already been punished sufficiently." But that plea is made by all defense lawyers and does not explain the difference in sentences. The Government does attempt to explain why defendant Gerace received a lesser sentence than Salb. But Gerace's sentence is entirely irrelevant to Salb's claim. Salb has taken the position that the difference in sentences between him and Gerace may well be based on permissible grounds;

Instead, in attempting to deny that Salbo's sentence was affected by his insistence on pleading not guilty and standing trial, it is forced into the uncomfortable position of arguing with the findings of the Court of Appeals. The Court of Appeals explicitly found that the defendants who pleaded guilty were "the chief culprits," and that their "light sentence" constituted "a reward" (Appendix A, Salbo's petition at p. A-3). In attempting to explain away this finding, the Government makes the wholly unfounded assertion that the Court of Appeals' characterization of the defendants who pleaded guilty as the chief culprits "was a reference to their role as the principal actors in the *actual thefts* from Lederle rather than a suggestion that they were the kingpins in the conspiracy" (opposition brief at p. 12 n. 6, emphasis added). This is simply wrong. The context of the statement—a general discussion of the "enterprise that was the subject of this indictment"—makes it clear beyond dispute that Judge Friendly was characterizing the defendants who pleaded guilty as the chief culprits of the *entire enterprise* and not just of the "actual thefts." We reproduce the relevant sentences in a note in complete confidence that a fair reading will leave no doubt that the Government's interpretation is entirely without merit.[5]

Gerace was a minor participant (see Salb's petition at p. 3) whose unsolicited disclosures broke the case. But the fact that the difference in Salb's and Gerace's sentences may be justified is entirely irrelevant to the argument that the difference in Salb's and the chief culprits' sentences can only be explained as an impermissible "penalty imposed by courts for exercising a constitutional privilege." *Griffin v. California*, 380 U.S. 609 (1965).

[6] "The enterprise that was the subject of this indictment involved stealing and preserving cultures Lederle had developed, temporarily removing and copying documents that outlined manufacturing procedures, and then selling the cultures and the copies primarily for ultimate exportation to Europe. As in so many criminal trials, the

In attempting to convert Salb into a "ringleader" and the "chief culprits" into innocent followers, the Government not only contradicts the Court of Appeals; it contradicts the record as well. In its "statement,"[5] the Government says that "each of the petitioners" was convicted on "count 9." But as Salb pointed out in his petition (at p. 27) *he was acquitted* on count 9 (R. 2565) and consequently was found guilty on fewer counts than any of the other five relevant defendants. Moreover, the Government's allegation that the trial court regarded Salb as a "tempter" of the actual thieves flies in the face of the record. The trial judge explicitly found that Fox, Fine, and Cancelarich stole the processes "on their own, wilfully and knowingly" (R. 2873). "Nobody told you to do this. You did this on your own. You weren't goosed, as the saying goes, by either Salb, or Sharff, or Bottone" (R. 2897).[6]

The Government's assertion that "This case is not like *United States* v. *Wiley* . . . (brief for the United States in opposition, p. 12), is based on a misstatement of the facts in *Wiley* which allegedly distinguish it from this case. The Government describes Wiley as "a minor defendant with-

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Government's case was presented mainly through the chief culprits, two former Lederle employees, Sidney Fox and John Cancelarich, and their lieutenant, Leonard Fine, all of whom pleaded guilty to the charges against them and were rewarded for their cooperation with light sentences of six months' imprisonment. The serious crimes charged against the appellants, Salb, Sharff and Bottone, were on the receiving end." *United States* v. *Bottone, Salb and Sharff,* F.2d (1966) (Appendix A, Salb's petition).

[6] The Government's carelessness with the facts is also reflected by its assertion on page 13 that "The contention that petitioners were denied a fair trial because imposition of the sentences of [sic] petitioners' codefendants was delayed until the conclusion of petitioners' trial was not raised in the Court of Appeals." This also is untrue. That contention was explicitly raised in the reply brief to the Court of Appeals, filed on June 27, 1966, at p. 3.

out a criminal record" (*Id.* at 12-13). The sentencing judge in *Wiley* said, however, that Wiley "actually induced the commission of crimes such as these" (184 F. Supp. 679, 687), and that he *did* have a criminal record which included "a charge of receiving stolen property [for which he was] placed on probation for a period of six months" as well as "several" gambling arrests (Id. at 686). Salb, on the other hand, was entirely without a criminal record and was, in fact, a lesser defendant. The cases do present an important conflict which should be resolved by this Court.

Respectfully submitted,

MOSES POLAKOFF
Counsel for Petitioner

ALAN M. DERSHOWITZ
GRACE POLK STERN
of Counsel

Langdell Hall
Cambridge 38, Massachusetts